

THE HIGH COURT,

1917.

Chief Justice :

THE HON'BLE SIR LANCELOT SANDERSON, Kt., K.C.

Puisne Judges :

THE HON'BLE SIR JOHN G. WOODROFFE, Kt.
„ SIR ASUTOSH MOOKERJEE, Kt., C.S.I.
„ SIR CHARLES W. CHITTY, Kt.
„ E. E. FLETCHER.
„ D. CHATTERJEE (*resigned*).
„ N. R. CHATTERJEA.
„ W. TEUNON.
„ T. W. RICHARDSON.
„ SIR ASUTOSH CHAUDHURI, Kt.
„ C. P. BEACHCROFT.
„ W. WALMSLEY.
„ W. E. GREAVES.
„ B. B. NEWBOULD.
„ NAWAB SIR SYED SHAMS-UL-HUDA, K.C.I.E.
„ M. SMITHER (*offg.*).
„ A. H. CUMING (*offg.*).

Advocate-General :

THE HON'BLE T. C. P. GIBBONS, K.C.
„ SIR SATYENDRA SINHA (*offg.*).
„ B. C. MITTER (*offg.*).

Standing Counsel :

THE HON'BLE B. C. MITTER (*resigned*).
S. R. DAS.

CORRIGENDA.

Page 5, line 24, *for* "in" *read* "on."

Page 29, line 2 from bottom, *for* "dite" *read* "lite."

Page 220, line 32, *for* "acheme" *read* "scheme."

Page 359, line 4 from bottom (ref.), *for* "Bom. H. C. 96"
read "Bom. H. C. 76."

Page 442, line 3 from bottom (ref.), *for* "W. R. 365" *read*
"W. R. 375."

Page 522, line 29, *for* "remain" *read* "retain."

Page 531, line 17, *for* "questions" *read* "question."

Page 537, line 4 from bottom, *for* "referred to show" *read*
"referred to, to show."

Page 539, lines 1 and 2, *for* "interpretation of statutes"
read "Interpretation of Statutes."

Page 633, last line (ref.), *for* "27 All. W. N. 799" *read* "27
All. W. N. 286."

Page 636, last line but four (ref.), *for* "I. L. R. 38 Mad. 628"
read "I. L. R. 38 Mad. 682."

Page 636, last line but three (ref.), *for* "L. R. 36 I. A. 165"
read "L. R. 36 I. A. 168."

Page 638, last line but two (ref.), *for* "I. L. R. 13 All. 35"
read "I. L. R. 13 All. 53."

Page 752, line 7 from bottom, *for* "in" *read* "on."

Page 753, line 19, *for* "it" *read* "if."

Page 753, line 20, *for* "instance" *read* "instance the onus
of proof."

Page 767, line 13, *for* "limitation" *read* "limitation was
not pleaded."

Page 841, line 11 from bottom, *for* "Regulation" *read*
"Regulations."

Page 842, line 12 from bottom, *for* "laud;" *read* "land."

Page 858, line 13, *for* "Far" *read* "Farr."

Page 879, line 5 from bottom, *for* "Section 25" *read* "under
Section 25."

Page 879, line 4 from bottom, *omit* "Under."

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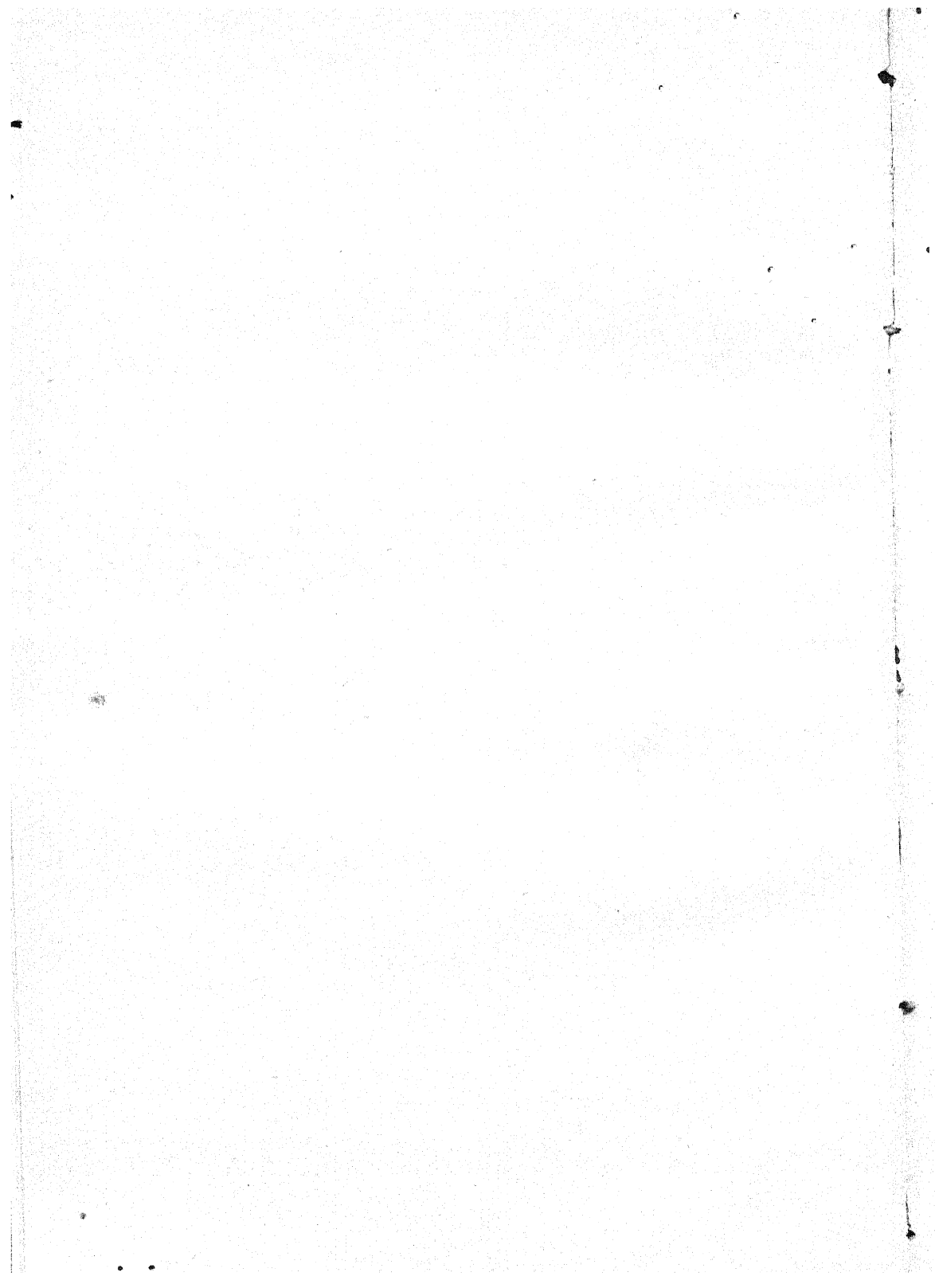
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THE
INDIAN LAW REPORTS,
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PRIVY COUNCIL.

NOBIN CHANDRA BARUA

v.

CHANDRA MADHAB BARUA.

P.C.^c
1916

July 14.

(ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.)

Accounts, suit for—Limitation Act (XV of 1877), Sch. II, Art. 89, and s. 8.—Principal and Agent—Death of Principal leaving sons some of whom were minors—Proprietor appointed by co-proprietors manager of estate for payment of joint debts—Omission to bring cross-appeal to High Court or file cross-objections under s. 561, Civil Procedure Code, 1882—Bar to decree for claim in full on appeal to Privy Council.

In this case, which was an appeal from the decision of the High Court in *Chandra Madhab Barua v. Nobin Chandra Barua* (1), their Lordships of the Judicial Committee found that there was no evidence of any kind that a demand for and refusal of accounts was made after the death of the plaintiffs' (appellants') father; and that there was nothing in the plaint to justify the inference drawn by the High Court in that respect adversely to the plaintiffs.

Held, that the minor plaintiffs being entitled to the benefit of s. 8 of the Limitation Act, 1877, and Art. 89 of Sch. II of that Act being applicable to the suit, there was nothing in the provisions of that Article to protect the defendant (respondent) against the liability to render accounts

^c Present : LORD SHAW, LORD PARMOOR AND MR. AMEER ALI.

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from July 1896 (as decreed by the Subordinate Judge) and limit his liability to do so only from August 1901 (as decided by the High Court). In the absence of any cross-appeal by the plaintiffs to the High Court, or any cross objections filed by them under s. 561 of the Civil Procedure Code, 1882, they could not obtain on this appeal a decree for accounts for the whole period of the agency, but they were entitled to the restoration of the order of the Subordinate Judge for accounts for the longer period.

APPEAL No. 4 of 1915 from a judgment and decree (11th June 1912) of the High Court at Calcutta which varied a judgment and decree (21st May 1910) of the Subordinate Judge of Goalpara.

The plaintiffs were appellants to His Majesty in Council.

The main question for determination on the present appeal was whether the appellant's claim that the respondent was liable to render him accounts was barred by limitation.

The facts which led up to this litigation will be found sufficiently stated in the report of the appeal to the High Court in *Chandra Madhab Barua v. Nobin Chandra Barua* (1).

The alleged liability of the respondent to account arose out of his management of a lakhraj estate in the district of Goalpara comprising (amongst other lands) a large tract of forest land. The appellants' father Nanda Kumar Barua was the owner of one moiety of the estate, and his uncles the respondent and Chandi Charan Barua were the owners of the other moiety of the estate which had become heavily involved in debt; and the arrangement made in 1887 was that the respondent should take sole charge of and manage the forest land so as to pay off the debts out of the income and collections; and that he should render accounts of his management from time to time to his nephew Nanda Kumar Barua.

Nanda Kumar Barua died in 1899, leaving three sons, two of whom were minors.

The suit was brought on 12th September 1904 on the allegation that no accounts had ever been rendered, which was denied by the respondent, who also pleaded limitation as barring the suit.

The Subordinate Judge found on the evidence (i) that the respondent managed the forest land from the end of the Bengali year 1293 (corresponding to the 10th April 1887) to the date of a notice which was given of the termination of the arrangement for his management, namely, 16th January 1902; (ii) that he did not render any accounts during the whole of that period; (iii) that the respondent was an agent for Nanda Kumar Barua down to the latter's death (July 1899), but was not thereafter agent for the appellants; and (iv) that Nanda Kumar Barua demanded accounts from the respondent at the end of 1897 (April 1891) and that the respondent must be taken to have refused to render them; but that from that time onward no demand was made on him for accounts either by Nanda Kumar Barua or by the appellants down to the termination of his management.

On these findings the Subordinate Judge held that for the period prior to the death of Nanda Kumar Barua the suit was governed by Article 89 of the Limitation Act, 1877, and the appellants were entitled to accounts from the month of Sraban 1303 (July-August 1896) to the date of their father's death; that Article 120 of the Limitation Act was applicable for the period after Nanda Kumar Barua's death, and the suit was therefore not barred; and that the appellants were therefore entitled to an account from the respondent from July 1896 to 16th January 1902; and the suit was accordingly decreed on that basis with costs.

An appeal by the respondent to the High Court

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was heard by STEPHEN and RICHARDSON JJ. who held that in 1306 (1899-1900) shortly before Nanda Kumar Barua's death accounts were demanded from the respondent which demand was not complied with; that after Nanda Kumar Barua's death the respondent became agent for the appellants as he had been for their father; that Article 89 of the Limitation Act applied to both periods, and so far as the first period was concerned limitation would run from the date of the demand made in Nanda Kumar Barua's life-time; that after his death it must be taken from the plaint, though not proved, that the appellants continued to demand accounts as long as the agency lasted, and that limitation would run from the termination of the agency. The appellants were therefore entitled to accounts only from Bhadra to Magh (August 1901 to January 1902), and that as to the rest of the claim the suit was barred.

The High Court allowed the appeal and decreed accordingly.

On this appeal,

Sir William Garth, for the appellants, contended that there was no demand for and refusal of accounts during the respondent's management within the meaning of Schedule II of Article 89 of the Limitation Act, 1877; at any rate, there was no such demand and refusal after April 1891. The High Court had wrongly held that there was a demand and refusal in 1306 (1899); and also had erred in finding that the appellants repeatedly demanded and were refused accounts after Nanda Kumar Barua's death. The High Court in so finding acted on an inference from some statement in the plaint, but there was admittedly no evidence of any such demand and refusal. Reference was made to *Anundomoyee Chowdhurani v. Sheeb*

Chunder Roy (1) and *Madho Persad v. Gajadhar* (2) as showing that a strict construction should not be applied to pleadings in Indian mofussil suits. The agency admittedly continued until the notice terminating it, and the date of suit was within 3 years of the termination of the agency. The point under section 8 of the limitation was decided by the Subordinate Judge in favour of the appellants. The appellants' claim should have been decreed for the whole period of the agency.

De Gruyther, K. C., and *B. Dube*, for the respondent. The Subordinate Judge disallowed the appellants' claim in part, and there having been no cross-appeal by them to the High Court from that decision, and no cross-objections having been filed under section 561 of the Civil Procedure Code, 1882, the appellants if successful were not entitled to have the suit decreed in full: they were in any case only entitled to accounts from 1896 as given by the first Court: see section 540 of the Civil Procedure Code, 1882. Treating Nanda Kumar Barua as principal, the agency of the respondent terminated at his death, and his sons could bring a suit for accounts only within 3 years of his death. Each of the sons held in the father's death a specific one-third share. The minors could not appoint an agent, but the adult son having allowed the respondent to continue to act, there was an implied agency, and the respondent being thus agent for the adult member, the suit, so far as he was concerned, was barred. The eldest son as managing member of the family on his father's death was capable of giving an absolute discharge, and limitation was therefore, it was submitted, not suspended against the minors. Reference was made to Mayne's Hindu Law, 7th Ed.

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paragraphs 335, 336 and 372; *Kishan Prasad v. Har Narain Singh* (1) and *Sheo Shankar Ram v. Jaddo Kunwar* (2).

Sir William Garth, called on to reply only on the point of procedure, submitted that a special appeal might be granted *nunc pro tunc*, to give the appellants the relief to which they were entitled in the suit.

July 14.

The judgment of their Lordships was delivered by LORD PARMOOR. The appellants' father, Nanda Kumar Barua, was the owner of one moiety and his uncles, the respondent and Chandi Charan Barua, were the owners of the other moiety of a lakhraj estate in the district of Goalpara comprising a large tract of forest land. In or about the year 1894 Nanda Kumar Barua entered into an agreement with the respondent under which the respondent was appointed agent for the purpose of collecting rents and profits from the forest land, in order gradually to pay off a heavy debt, rendering accounts of his management, from time to time, to Nanda Kumar Barua. Nanda Kumar Barua died in July 1899. He left three sons, the appellants, two of whom were minors. For about two years after the death of the appellants' father, the respondent managed the property on the same terms as before. The agency was terminated by a notice dated the 16th January, 1902. In September 1904 the appellants commenced a suit against the respondent claiming a declaration that the respondent was liable to render accounts to the plaintiffs of the amount realised in respect of the said property for the whole period of the agency. The Subordinate Judge ordered an account of the income and expenditure in regard to the Forest (Timber) Mahal, belonging jointly to both

parties, from the month of Sraban 1303 B.S. (1) to the month of Magh 1308 B.S. (2). Against this order the respondent appealed to the High Court. The appeal was allowed and the order of the Subordinate Judge was varied so as to limit the account to five months from Bhadra to Magh 1308 (3). It is against this order that the appeal is brought.

During the course of the argument, the counsel for the appellants asked that accounts should be ordered for the whole period of the agency, but in the absence of any cross-appeal to the High Court, or of any memorandum such as is required to be filed under section 561 of the Code of Civil Procedure 1882, it is not competent for the appellants to get any further remedy than the restoration of the order of the Subordinate Judge. It is unnecessary to consider the argument addressed to their Lordships as to any liability to account from an earlier date. The question on appeal is limited to the consideration whether the order of the Subordinate Judge should be restored.

It was not argued before their Lordships that, after the death of Nanda Kumar Barua in Sraban 1306 (4) the position of the respondent was altered or that he became a trustee in place of an agent. Consequently, Article 89 of the Limitation Act, 1877, applies, and the only point for decision is whether the provisions contained in this Article protect the respondent against a liability to render accounts from the month of Sraban 1303 B.S. (5) and limit his liability to render accounts from Bhadra 1308 (6). In their Lordships' opinion the order of the Subordinate Judge should be restored.

In section 89 of the Limitation Act, the period

(1) July-August 1896.

(2) January 1902.

(3) August 1901 to January 1902.

(4) July 1899.

(5) July-August 1896.

(6) August 1901.

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of limitation is three years from the date when the account is demanded and refused, or from the conclusion of the agency. It appears doubtful how far there had been any demand and refusal during the life-time of Nanda Kumar Barua, but in any case at the date of his death his representatives would have been entitled to demand an account for a period of three years. There is no evidence of any kind that a demand and refusal of accounts were made by or on behalf of the appellants after the death of Nanda Kumar Barua.

The learned Judges of the High Court appear to have acted on a statement in the plaint of the appellants. They hold that from the language of the pleading they must suppose that demands were going on as long as the business was in existence, although the dates of the demands are not given or proved. Their Lordships cannot find in the plaint any statement which would justify the inference which the learned Judges have drawn, and in the absence of evidence are of opinion that no such inference can properly be drawn adversely to the claim of the appellants. The statement of objections on the part of the respondent does not allege that there has been any demand and refusal of accounts after the death of Nanda Kumar Barua. The evidence of the respondent is inconsistent with any such case, since he states that he had settled the accounts with Nanda Kumar and with the appellants in 1306 and 1307 (1). This evidence is not believed by the Subordinate Judge. He finds that during the period of the management the respondent has furnished no accounts and has not, by any act of Nanda Kumar or his heirs, been exempted from the duty of furnishing accounts.

A subordinate question was raised on section 8 of

(1) 1899 and 1900.

the Limitation Act. The answer is that the two appellants who were minors did not come of age until a month or two before the case was heard by the Subordinate Judge, and that the appellant who was of age, Nobin Chandra, was not capable of giving a discharge which would bind the two minors.

Their Lordships will humbly advise His Majesty that the appeal should be allowed and that the order of the Subordinate Judge should be restored with costs here and below.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondent: *Barrow, Rogers & Nevill.*

J. V. W.

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March 31.

SHAMA KANTA CHATTERJI & Co.

v.

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*Waiver—Jurisdiction—Leave to sue—Letters Patent, 1865, cl. 12—
Estoppel.*

Where the plaintiff in his plaint alleges that portion of the cause of action arises outside the local limits of the Ordinary Original Civil Jurisdiction of this Court and fails to take leave under cl. 12 of the Letters Patent, the defendant may by appearing and pleading waive the objection to the jurisdiction. Where, however, the plaintiff alleges that the whole cause of action arises within the local limits of the Ordinary Original Civil Jurisdiction, thus setting up a complete jurisdiction in the Court, and the defendant is called upon to plead to this and does plead, but it turns out at the trial that the Court had not complete jurisdiction as portion of the cause of action arose within and portion outside the local limits of the Ordinary Original Civil Jurisdiction, the defendant cannot be held bound on the doctrine of estoppel on the ground that he waived the objection of want of jurisdiction.

King v. Secretary of State for India (1) and *Suckan v. Weiner* (2) referred to.

ORIGINAL SUIT.

This suit was instituted by the plaintiff firm to recover Rs. 10,456-5-3 pies, for the balance of price of goods sold and delivered to the husband of the defendant together with interest thereon. The plaintiff firm alleged that between the 23rd September, 1911, and the 22nd November, 1913, it had sold and delivered to Thakur Protap Narain Deb, the husband of the defendant, at his request in Calcutta, various goods

* Ordinary Original Civil Suit No. 1387 of 1914.

(1) (1908) I. L. R. 35 Cal. 394. (2) (1901) 17 T. L. R. 494.

and articles of the aggregate value of Rs. 18,807-7-3 pies, against which the said Thakur had paid from time to time to the plaintiff firm the aggregate sum of Rs. 10,930-2-0 pies leaving a balance of Rs. 7,377-5-3 pies for principal and Rs. 2,579 for interest, calculated at the rate of 12 per cent. per annum up to the 19th December, 1914, aggregating to Rs. 10,456-5-3 pies, the amount claimed in the suit. The plaint as presented alleged that the whole of the cause of action arose within the local limits of the Ordinary Original Civil Jurisdiction of this Court. The defendant filed her written statement, in which she pleaded on the merits, and also submitted that part of the cause of action arose outside the local limits of the Ordinary Original Civil Jurisdiction of this Court, and no leave under cl. 12 of the Letters Patent having been obtained, this Court had no jurisdiction to try the case. After filing the written statement, the defendant obtained an order for discovery of the plaintiff firm's documents and took such other steps as were necessary for a trial of the suit. At the trial, the defendant insisted upon her objection that the Court had no jurisdiction to try the case.

Issues were then settled between the parties, and evidence was adduced on both sides, and it was admitted that part of the cause of action had arisen outside the local limits of the Ordinary Original Civil Jurisdiction.

Mr. N. N. Sircar (with him *Mr. B. K. Ghosh*), for the defendant. If it is once conceded part of the cause of action arose outside Calcutta, leave under cl. 12 of the Letters Patent must be taken: *Doyr Narain Tewary v. The Secretary of State for India*(1). The case of *King v. Secretary of State for India*(2) has no application here. The plaint was one in which the

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(1) (1886) I. L. R. 14 Calc. 256, 270. (2) 1908) I. L. R. 35 Calc. 394.

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objection to the jurisdiction was not apparent on the face and so we had to file a written statement. Their plaint alleged that the whole cause of action arose in Calcutta. In the circumstances of this case, I was bound to plead and take all necessary steps for the trial of the suit

Mr. C. C. Ghose (with him *Mr. A. K. Ghose*), for the plaintiff firm. I admit leave under cl. 12 of the Letters Patent should have been taken, as part of the cause of action arose outside the limits of the Ordinary Original Civil Jurisdiction of this Court. But the defendant has waived the objection to the jurisdiction of the Court. She filed a written statement in which she took the point of jurisdiction saying part of the cause of action arose outside Calcutta. She could have applied for the trial of the issue as to jurisdiction. She did not do so. She obtained an order for discovery of documents and took other steps for the trial of the suit. The suit has been fought out, the whole of the evidence is now before the Court and the objection to jurisdiction should not be allowed. I rely on the cases of *King v. Secretary of State for India* (1) and *Suckan v. Weiner* (2)

FLETCHER J. This is a suit brought by the plaintiffs' firm to recover Rs. 10,456-5-3 for price of goods sold and delivered to the husband of the defendant. The dealings are alleged to have been taken place between the 23rd September, 1911, and 22nd November, 1913. Certain sums were paid in part payment of the amounts, leaving a balance of Rs. 7,877-5-3 due for principal and Rs. 2,579 for interest, calculated at the rate of 12 per cent. per annum up to the 19th December, 1914, aggregating to Rs. 10,456-5-3, the amount claimed in this suit. Learned counsel for the plaintiff company

(1) (1908) I. L. R. 35 Calc. 394. (2) (1901) 17 T. L. R. 494.

has frankly admitted in conducting the case, as presented, that the plaint alleges that the whole of the cause of action arose within the local limits of the Ordinary Original Civil Jurisdiction of this Court. That is manifest both from the statement in paragraph 1 and in paragraph 6 of the plaint. The plaintiff alleges in both paragraphs that the whole of the cause of action arose within the local limits of the Ordinary Original Civil Jurisdiction of this Court. The defendant thereupon has submitted that part of the cause of action arose outside the local limits of the Ordinary Original Civil Jurisdiction and no leave under clause 12 of the Letters Patent was obtained by the plaintiffs. The defendant has pleaded both on the merits and jurisdiction; first of all, on the merits, and, secondly, she pleaded want of jurisdiction in the Court to try this suit on the ground that a portion of the cause of action arose outside the local limits of the Ordinary Original Civil Jurisdiction of this Court, and therefore this Court has no jurisdiction to try this case without the leave of the Judge of the Court having been obtained under clause 12 of the Charter. Those objections the defendant has insisted upon down to the trial. The following issues were settled between the parties: (i) What goods were supplied by the plaintiffs to the defendant's husband and what is the fair and reasonable price thereof? (ii) Are the plaintiffs entitled to claim interest on the value of the supplied? (iii) The plaintiffs not having taken leave under clause 12 of the Letters Patent, is the suit maintainable in this Court? (iv) Has the defendant waived the objection mentioned in issue No. (iii)? I have no doubt that the prices of the goods were fair and reasonable; the prices charged may have been a little higher than could have been obtained elsewhere; but the deceased must have known from time to time what prices he was being charged for these goods

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and he must be taken to have approved of these prices. The first issue I decide in favour of the plaintiff Co. The second issue raised the question as to the agreement to pay interest. A member of the plaintiff firm has spoken about an express agreement by the Raja to pay interest on the amount in arrear. That evidence^o about the agreement to pay interest has been contradicted by the Dewan of the Raja and I think the Dewan's evidence ought to be accepted in preference to that of the plaintiff's man. The bill or draft of the promissory notes that was presented on the death of the Raja for signature by the executor shows that the claim for interest was not put forward. I cannot believe the plaintiff's story about the express agreement to pay interest at the rate of 12 per cent-per annum. The third question is about the question of jurisdiction. There is a class of cases of which the case of *King v. The Secretary of State for India* (1) and the case of *Suckan v. Weiner* (2) have been cited as examples where the Court has jurisdiction to try the case if the whole of the cause of action has arisen within the local limits of the Ordinary Original Civil Jurisdiction or the consent of a Court being obtained when a portion of the cause of action arises outside the local limits of the Ordinary Original Civil Jurisdiction. There are two classes of these cases: one where the plaintiff in his plaint alleges that portion of the cause of action arises outside the local limits and fails to take leave of the Court and the case comes on for trial. There is another class of cases where the plaintiff in his own plaint alleges that the whole cause of action arises within the local limits of the Ordinary Original Civil Jurisdiction, but it turns out at the trial that portion of the cause of action arose within and portion outside the local limits of the Ordinary Original Civil

(1) (1908) I. L. R. 35 Calc. 394.

(2) (1901) 17 T. L. R. 494.

Jurisdiction. In the first case the defendant may by appearing and pleading waive the objection to the jurisdiction. But where the plaintiff sets up a complete jurisdiction in the Court to try the case and the defendant is called upon to plead to this, if it turns out that the Court had not complete jurisdiction, obviously the defendant cannot be held bound on the doctrine of estoppel on the ground that he waived the objection of want of jurisdiction. The defendant could not waive a fact that he did not know of and when the plaintiff alleges that his cause of action arose within the local limits of the Ordinary Original Civil Jurisdiction the plaintiff would be bound for the purpose of pleading to assume that the statement is true. That seems to me the result of the cases cited in the argument. Now, what has happened in this case? It is not denied that a portion of the cause of action arose outside the local limits of the Ordinary Original Civil Jurisdiction of this Court. If we accept that the goods were in fact delivered to the defendant's husband at Harrison Road, the receiving office of the East Indian Railway Co., that does not get over the difficulty in this case, namely, that part of the cause of action arose outside the local limits of the Ordinary Original Civil Jurisdiction of this Court. The whole thing is unfortunately a mistake committed by the attorney in not drawing the plaint in a proper manner. It seems to me quite clear that in the present case the Court has no jurisdiction to try this suit. That being so, the present suit fails and must be dismissed with costs on scale No. 2.

A. K. R.

Attorney for the plaintiff Company: *R. N. Sircar*.
Attorneys for the defendant: *Kar, Mehta & Co.*

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CIVIL RULE.

D. Chatterjee and Bachcroft JJ.

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April 11.

RADHA SHYAM BASAK

v.

SECRETARY OF STATE FOR INDIA.*

Loss of Goods—Notice—"Railway administration"—Railways Act (IX of 1890) ss. 3(6), 77, 140—Scope of section 140—Notice to Government through Collector—Limitation Act (IX of 1908) Sch. I, Arts. 30, 31, 115—Contract—Breach of contract, for non-delivery.

Section 140 of the Railway Act has not the effect of cutting down the connotation of the words "railway administration" as contained in section 3 (6). It only provides for the convenience of the party aggrieved that if he wants to serve the notice on the Manager of the State Railway or the Agent of the Railway Company he must do so in one of the ways mentioned there. If the party chooses to give notice to the Government or the Native State or the Railway Company there is nothing in the Act to prevent his doing so; the latter alternative may enhance his trouble but it cannot take away his rights.

Secretary of State for India v. Dip Chand Poddar (1), *Great Indian Peninsula Railway Co. v. Chandra Bai* (2), *Janaki Das v. Bengal Nagpur Railway Co.* (3), *Perianna Chetti v. South Indian Railway* (4), *Nadiar Chand Shaha v. Wood* (5) referred to.

Per CHATTERJEE J. Notice served upon the Government through the Collector within six months is sufficient to satisfy the requirements of section 77 of the Act.

Article 30 of the 1st Schedule to the Limitation Act does not apply where the plaintiff's case is not for the loss of the goods, and where the defendant does not plead or prove any loss.

Per CHATTERJEE J. Article 31 applies to suits against a carrier for compensation for nondelivery of or delay in delivering goods, and the time

* Civil Rule No., 1210 of 1915, against the order of R. C. Sen, Small Cause Court Judge of Dacca, dated Oct 5, 1915.

(1) (1896) I. L. R. 24 Cal. 306.

(3) (1912) 16 C. W. N. 356.

(2) (1906) I. L. R. 28 All. 552.

(4) (1898) I. L. R. 22 Mad. 137.

(5) (1907) I. L. R. 35 Cal. 194.

for suit is one year from the time when the goods ought to be delivered. This Article contemplates a suit by the consignee and further it casts upon the carrier the onus of proving when the goods should have been delivered.

Per CHATTERJEE J. When there is a breach of a written contract Article 115 of the Schedule governs the case.

• *Mohan Sing Chawan v. Henry Conder* (1), *Danmull v. British India Steam Navigation Co.* (2) referred to.

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THE facts briefly stated are these. On the 23rd of March 1914, the plaintiffs booked two bundles of cotton thread at the Dacca station of the Eastern Bengal State Railway under an invoice to one Gobinda Chandra Das at Narsingdih, a steamer station of the India General Navigation and Railway Company. On the 25th of May 1914, the plaintiffs wrote to the District Traffic Superintendent complaining of the non-delivery of the goods and asking for an enquiry. On the 5th of June 1914, the plaintiffs served notice upon the Traffic Manager, Eastern Bengal State Railway, Calcutta, to the effect that if the goods were not received within one week a suit would be brought for the recovery of the value thereof. On the 1st of August 1914, the plaintiffs served a notice upon the Secretary of State for India in Council (Dacca Collectorate Office) by a registered letter.

On the 18th September 1914, the Traffic Manager of the Eastern Bengal State Railway, Calcutta, wrote to the plaintiffs as follows: "With reference to your notice, dated the 1st ultimo, served on the Secretary of State for India in Council, will you please let me know how your claim for Rs. 408-15 has been arrived at. This is without prejudice." There was further correspondence between the plaintiff and the Traffic Manager—the sum and substance of the correspondence being that the matter was still under enquiry and that the plaintiffs would be informed as

(1) (1883) I. L. R. 7 Bom. 478.

(2) (1886) I. L. R. 12 Calc. 477.

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soon as the enquiries were completed. The plaintiff then served another notice by way of a reminder upon the Secretary of State for India in Council, on the 28th of January 1915, demanding payment within two months. The plaintiff then instituted the present suit on the 22nd of April 1915 against the Secretary of State for India in Council in the Small Cause Court at Dacca for the recovery of Rs. 408-15 on the allegation that the goods were dishonestly misappropriated by the Company's servants and were not delivered to the consignee and as such the consignee would not be liable for the value of the goods. The plaintiffs, therefore, have suffered loss to that extent and prayed for a decree for that amount.

In the written statement the defendant contended that no notice had been served on the Agent of the Eastern Bengal State Railway and that the suit was barred under Articles 30 and 31 of Schedule I of the Limitation Act, and, on the merits, he contended that the goods had not been delivered at all but that the plaintiffs acted in collusion with the servants of the Company and committed a fraud.

The Small Cause Court Judge held that the defendant company received the cotton threads for despatch to the consignee at Narsingdih, but that probably the goods had gone astray at Dacca instead of being put into the right wagon. He held that the suit was governed by Article 49 and not by Articles 30 and 31 of Schedule I of the Limitation Act. But he dismissed the suit on the ground that notice to the Secretary of State in Council was served on the 28th of January 1915, *i.e.*, after six months and the notice to the Traffic Superintendent was of no value as he was not the Manager's agent and was not the proper person to receive it.

The petitioners, Radha Shyam Basak and others,

thereupon moved the High Court and obtained this Rule.

Dr. Sarat Chandra Basak (with him *Babu Hemendra Kumar Das*), for the petitioners, contended that notice was admittedly served on the Secretary of State on the 1st of August 1914, i.e., within six months; the subsequent notice on the 28th of January 1915 was merely by way of a reminder. By section 77 of the Railways Act (1X of 1890) notice has to be served on the Railway Administration and by section 3, Railway Administration is defined "to mean the Manager and to include the Government" in the case of Railways administered by the Government, and therefore notice to the Secretary of State was sufficient notice. Section 140 deals with the manner of notice and is not exhaustive as regards the individual to be served. Section 140 is governed by the definition in s. 3(6): *Secretary of State v. Dip Chand* (1), *Great Indian Peninsula Railway Company v. Chandra Bai* (2), *Janaki Das v. Bengal Nagpur Ry. Co.* (3). Notice to the Traffic Manager was sufficient. He relied upon the Rules published by the Eastern Bengal State Railway.

The Senior Government Pleader (Babu Ram Charan Mitra), for the Secretary of State, contended that the notice served upon the Secretary of State was one under section 80 of the Code of Civil Procedure and not under section 77 of the Railways Act. Section 140 of the Railways Act is exclusive and notice to the Government is not a good notice. Sections 77 and 140 must be read together. It is not necessary to refer to the definition in section 3(6). I support the judgment on the ground that the suit having been

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(1) (1896) I. L. R. 24 Calc. 306. (2) (1906) I. L. R. 28 All. 552.

(3) (1912) 16 C. W. N. 356.

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brought more than a year after the goods were booked. it was barred by limitation under Articles 30 and 31 of Schedule I to the Limitation Act.

Babu Hemendra Kumar Das was called upon, in reply, on the point of limitation only. He submitted that the suit was governed by Article 49 as the suit was one for wrongful misappropriation of the goods by the Company's servants. The Company is liable for the criminal acts of its servants committed in the usual course of their duties. Article 30, he submitted, did not apply as it was not the plaintiff's case that the goods were lost nor did the defendants set up or prove loss: *Mohan Sing Chawan v. Henry Conder* (1), *Danmull v. British India Steam Navigation Co.* (2). The onus was upon the defendant to prove loss and the Court would not presume loss without any evidence. Then even if the case is governed by Article 31, I have one year from the date when the goods ought to have been delivered. There was no evidence to show when the goods ought to have been delivered. If the defendant wants to take advantage of Article 31, he should prove what time it ordinarily takes for the goods booked at Dacca for Narsinghdih to reach its destination. One month ordinarily is not too much.

Then there has been an acknowledgment within the meaning of section 19 of the Limitation Act: the last letter written by the Traffic Manager saying that the matter was under enquiry was on the 8th of January 1915. Therefore the suit is not barred.

Finally, there was a written contract, *i.e.*, the invoice. Therefore Article 115 of the Limitation Act applies.

Cur. adv. vult.

D. CHATTERJEE J. The petitioners on the 23rd

(1) (1883) I. L. R. 7 Bom. 473.

(2) (1886) I. L. R. 12 Cal. 477.

March 1914 consigned two bundles of cotton thread at the Dacca Station of the Eastern Bengal State Railway for conveyance to one Gobinda at Narsingdih. The goods did not reach the consignee and information was given to the District Traffic Superintendent on the 25th of May 1914. On the 5th of June 1914 they gave notice to the Traffic Manager of the Railway at Sealdah that if they did not get delivery within a week they would bring a suit. The petitioners say they gave this notice in accordance with the following Rule printed and published in the Fare and Time Table of the Eastern Bengal State Railway. "References regarding delay in transit to or loss of goods, parcels, luggage or other articles and claims for compensation and refunds should be addressed to the Traffic Manager, Calcutta". They also say that the said Railway has no officer who is called the Manager, but there is one called the Agent. On the 1st August 1914 they served a notice on the Secretary of State through the Collector of Dacca demanding payment of compensation and informing him that in default of payment a suit would be brought after two months. This notice was, it seems, sent over by the Collector to the Traffic Manager who wrote to the petitioners asking for details of their loss and such details were duly supplied on the 4th of October 1914. On the 23rd December 1914 and 8th January 1915 the Traffic Manager wrote to them that the matter was under enquiry. The petitioners brought a suit for the recovery of the price with compensation. The defendant, the Secretary of State, pleaded (i) that the suit was not maintainable as no notice had been given to the Agent of the Railway under section 77 of the Railways Act; (ii) that the suit was barred by Articles 30 and 31 of the 1st Schedule to the Limitation Act; (iii) that no goods were in reality consigned

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by the plaintiffs who brought the suit in collusion with the servants of the Railway.

The learned Judge, in the Court below, held that the goods had been really consigned but must have gone astray at Dacca, instead of being loaded in the proper wagon, but as no notice had been served on the Agent within six months he dismissed the suit with costs.

The petitioners obtained this Rule from this Court and it is urged at the hearing that the learned Judge was wrong in his decision on the question of notice.

Section 77 of the Railways Act provides that notice must be given to the Railway Administration within six months of the delivery of the goods for carriage by the Railway. Section 3(6) says that "Railway Administration" in the case of a Railway administered by Government, means the Manager of the Railway and includes the Government and in the case of a Railway administered by a Railway Company means the Railway Company. Section 140 provides that any notice required to be served on a Railway Administration may be served in the case of a Railway administered by the Government, on the Manager and in the case of a Railway administered by a Railway Company on the Agent of the Company in India.

It is contended by the learned vakil for the petitioners that the service of the notice dated the 1st of August 1914 on the Secretary of State through the Collector of Dacca was sufficient to meet the requirements of section 77. The learned vakil for the Secretary of State contends that section 140 is imperative and no notice but on the Manager is acceptable. I think section 140 has not the effect of cutting down the connotation of the words Railway Administration as contained in section 3(6). It only provides for the convenience of the party aggrieved that if he wants to serve the notice on the Manager of the State Railway

or the Agent of the Railway Company he must do so in one of the ways mentioned there. If the party chooses to give notice to the Government or the Native State or the Railway Company there is nothing in the Act to prevent his doing so; the latter alternative may enhance his trouble, but it cannot take away his rights. I think the clause "includes the Government" has the effect of extending the meaning of the words Railway Administration as the said words might not mean the Government when there was a Manager. A number of cases have been relied on in this connection by either side, but I do not think that any of those cases contra-indicates the above view. The case of the *Secretary of State v. Dip Chand Poddar* (1) is, however, the only case which had reference to a State Railway. The notice to the Collector there was beyond six months from date of delivery and therefore of no avail: the other notice was to the Traffic Superintendent, within six months and the case was sent back for a finding whether it reached the Manager within the required time. This case, if it helps any side, seems to help the petitioners, for it was held in effect that it was not necessary to serve notice both on the Collector and the Manager; for if it were the opinion of the Court that the Railway Administration meant both the Manager and the Government, and notices were required to be given to both, the case would have been disposed of at once as the notice on the Collector was out of time.

All the other cases referred to in the argument are Railway Company cases and have hardly any bearing on the point at issue before us. Some of them, however, do indicate the opinions of the learned Judges who decided them on the point and may be referred to in this connection. The case of the *Great Indian*

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(1) (1896) I. L. R. 24 Calc. 306.

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Peninsula Railway Company v. Chandra Bai (1) held that a notice to the General Traffic Manager was not a notice to the Agent and was therefore insufficient. The learned Judges, however, say in one part of their judgment "the notification of a claim prescribed by section 77 may therefore be given either to the Railway Administration as defined in section 3(6) or in any other way." In the case of *Janaki Das v. The Bengal-Nagpur Railway Company* (2) it was held that a notice to the Goods Superintendent is not a valid notice under sections 77 and 140. Sir Lawrence Jenkins, C.J., says in his judgment, however, "the method of service permitted by this section (140) has not been followed nor has it been shown that the claim has been otherwise preferred to the Railway Administration so as to satisfy the requirements of section 77." The Madras High Court also expressed a similar opinion in the case of *Periannan Chetti v. South Indian Railway Company* (3). The learned Judges say "We do not think that section 140 precludes a claimant from showing that the notice required by section 77 did in fact reach the Agent within the time limited though not in one of the modes prescribed by section 140." This view is in accordance with what was held in this Court in the case of the *Secretary of State v. Dip Chand Poddar* (4). I am aware of a note of dissent from the Madras case expressed in the case of *Nadiar Chand Shah v. Wood* (5), but that case must be read by the light of its own facts, and, besides, the authorities quoted do not seem to support the opinion which was expressed in terms rather too general. Furthermore, that was a Company case and the point now before us was foreign

(1) (1906) I. L. R. 28 All. 552.

(3) (1898) I. L. R. 22 Mad. 137.

(2) (1912) 16 C. W. N. 356.

(4) (1896) I. L. R. 24 Calc. 306.

(5) (1907) I. L. R. 35 Calc. 194.

to the enquiry. I think, therefore, that these cases do not support the contention of the opposite party and the notice that was served in this case upon the Government through the Collector within six months was sufficient to satisfy the requirements of section 77. In this view of the case it is not necessary to consider whether the notice to the Traffic Manager was a valid notice. I think it right to state, however, that the position taken by the learned Government Pleader in this respect also is very debatable. He says the notice ought to have been to the Manager of the Railway, but there is no officer having that designation on this Railway; then he says the notice ought to have been served on the Agent, but the law does not require the notice to be given to the Agent in a State Railway, and if a notice had actually been given to the Agent it could have been argued that it should have been given to the Manager; then again there is no evidence that the Agent is the Manager or that the Traffic Manager is not the Manager.

On the other hand the time and fare table of the Railway, which is presumably issued by the authority of the Railway Administration, directs the public to give notices to the Traffic Manager. I think that it is the duty of the Government to throw more light on this point and inform the public that the Manager of the Railway for the purpose of serving notices is either the Traffic Manager or the Agent or some body else.

The next question is that of limitation under Article 30 or 31 of the 1st Schedule to the Limitation Act. The goods were delivered to the Railway on the 23rd of March 1914 and the suit was brought on the 22nd of April 1915 about a month over one year after. Article 30 does not apply as the plaintiff's case was not for the loss of the goods and the defendant

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did not plead or prove any loss. On the other hand the defendant pleaded that no goods had been delivered at all. Article 31 applies to suits against a carrier for compensation for non-delivery of or delay in delivering goods and the time for suit is one year from the time when the goods ought to be delivered. I think this Article also has no application. In the first place this Article seems to contemplate a suit by the party who is entitled to the delivery, namely, the consignee. In the second place it would be for the Company to show when the goods ought to have been delivered—that fact being presumably within its knowledge, but there is no evidence on the point: on the contrary the case of the defendant being that no goods were in reality delivered, he could hardly prove when the goods should have been delivered. Narsingdih is not a place on the same line but has to be reached after trans-shipment at Naraingunge so that one cannot even by guess say that the goods should have reached within a month. Apart from this consideration, however, I think that this is a case of a breach of a written contract, and Article 115 of the schedule governs the case. It was so held in a similar case, *Mohansing Chawan v. Henry Conder* (1), which was followed by Garth C. J. and Wilson J. in the case of *Danmull v. British India Steam Navigation Company* (2). This being so, the suit was not barred by limitation. The learned Judge says he would have decreed the suit for Rs. 392-15 annas only if it were maintainable. I would therefore, decree the suit for Rs. 392-15 annas with costs. The petitioners are entitled to their costs in this Court. The Rule is accordingly made absolute.

BEACHCROFT J. I agree that in view of the definition of the words "Railway Administration" in

(1) (1883) I. L. R. 7 Bom. 478.

(2) (1886) I. L. R. 12 Calc. 477.

section 3 (6) of the Act, the notice under section 77 is effective if served on the Government, and that section 140 does not mean that the Manager is the only person on whom notice can be served, but that if notice is served on the Manager, the only alternative being service on the Government, it must be served on him in the manner provided.

Whether the Collector is the proper person to receive notice under section 77 on behalf of Government when notice is served on Government and not on the Manager, I express no opinion; but as the learned Government Pleader did not suggest that he was not, except in so far as he argued that under section 140 notice must be served on the Manager alone, for the purpose of this Rule I accept the position that notice to the Collector is notice to the Government. As regards the question of limitation, it is sufficient to say that I agree that Article 30 does not apply, and that if Article 31 does there is no evidence when the goods ought to have been delivered.

I agree in decreeing the suit.

S. K. B.

Rule absolute.

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ORIGINAL CIVIL.

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April 17.

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KUSUM KUMARI DAS.*

Practice—Partition suit—Parties—Review—Civil Procedure Code (Act V of 1908) s. 152, O. XLVII, r. 1.—Partition of undivided share—Fraudulent representation.

Where the mortgagees of the plaintiffs' share in a partition suit applied (i) to be added as parties to the suit, and (ii) for revocation of an order made by another Judge directing a sale of the one-fourth share of certain premises which is one of the properties to be partitioned in the suit on the ground that the conduct of the mortgagors and their attorneys was fraudulent and that the said order was made without jurisdiction :—

Held, that one Judge cannot set aside an order made by another Judge, even though the order be wrong. The remedy lies in review on the grounds set out in Order XLVII, r. 1.

Sharup Chand Mala v. Pat Dassee (1), *Jatra Mohun Sen v. Aukhil Chandra Chowdhry* (2) referred to.

THIS was a rule *nisi* obtained by the mortgagees of the plaintiffs' share in a partition suit.

The mortgagees applied (i) to be made parties to the suit, and (ii) for the setting aside of an order made by Chaudhuri J., on the application of Girirani Dasi, one of the defendants for the sale of one-fourth share of premises Nos. 4 and 5, Jackson Ghât Street, which is one of the properties to be partitioned in the suit. Several mortgages were executed on various dates, subsequent to the date of the institution of the

* Application in Original Civil Suit No. 472 of 1910.

(1) (1887) I. L. R. 14 Calc. 627. (2) (1896) I. L. R. 24 Calc. 334, 336.

suit, purporting to charge the plaintiffs' undivided half share in the estate of Dinabandhu Das, which estate was the subject-matter of the partition suit. A decree was passed, after the mortgages were executed, whereby it was declared that the plaintiffs were entitled to a one-third share and not one-half share in the estate of Dinabandhu Das. On this ground the mortgagees charged the mortgagors and their attorneys with fraudulent representation. On the 9th August 1915, Chaudhuri J. made an order for the sale of the one-fourth undivided share of Nos. 4 and 5, Jackson Ghat Street.

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Mr. S. R. Das, for the mortgagees, submitted that the Court could make no order for sale of the undivided share of the Jackson Ghât Street property so as to affect his mortgage. The real point is, is the property ordered to be sold the subject-matter of the suit? It is an undivided one-fourth share, other persons who are not parties to this suit being interested in the remaining three-fourths. This remaining one-fourth share could not possibly be partitioned.

Mr. B. C. Mitter, for Girirani Dasi, one of the defendants in the partition suit, in opposing the application, submitted that in an interlocutory application charges of fraud could not be dealt with, nor could an order made by one Judge be set aside by an interlocutory order made by another Judge. That the mortgagees could not be made parties. That an undivided share can be partitioned. It can be allotted to one or other of the parties or it can be sold and the sale-proceeds divided. The undivided share of the Jackson Ghât Street property was therefore one of the properties the subject-matter of this suit, and the mortgagee *pendente dite* is bound by the order. He cited the following authorities: *Purushottam v. Atmaram*

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Janardan (1), *Footloomary Dasi* v. *Wooday Chunder Biswas* (2), *Mohindrobhoosun Biswas* v. *Shosheebhoosun Biswas* (3), *Mahomed Kazim Shah* v. *R. S. Hills* (4), *Hem Chunder Ghose* v. *Thako Moni Debi* (5).

Mr. N. N. Sircar (with him *Mr. Goswami*), for the purchaser, *Shamermull Parruck*, supported *Mr. Mitter*.

Mr. P. N. Chatterji, for *Kusum Kumari Dasi*, the first defendant in the partition suit, also supported *Mr. Mitter*.

Mr. S. R. Das, in reply. No doubt by consent an order could be made for the sale of the undivided share, and the sale-proceeds divided. But that would not be a partition. The only power to sell for the purposes of the partition is under the Partition Act, where under certain circumstances, which are not present in this case, the Court may direct a sale for the purposes of partition. Undoubtedly he took the mortgage pending this partition suit and he is bound by all such orders made in this suit which are (i) strictly necessary for the purposes of the partition and (ii) in respect of property capable of being partitioned in this suit. The undivided share of the Jackson Ghât Street property could not be partitioned in this suit; it was therefore not a subject-matter of this suit, and any order made in this suit in respect of that property is without jurisdiction and cannot affect him. Under partition every member is entitled to a separate and exclusive possession of the share given to him. The plaintiffs have not that separate and exclusive share. So far as a Mitakshara family is concerned there is no difficulty in partitioning an undivided share. He referred to *R. C. Mitra's Law of Partition*, pp. 302, 396; *Maine's Hindu*

(1) (1899) I. L. R. 23 Bom. 597. (3) (1880) I. L. R. 5 Calc. 882.

(2) (1898) I.L.R. 25 Calc. 649, 652. (4) (1907) I.L.R. 35 Calc. 388, 392.

(5) (1893) I. L. R. 20 Calc. 533.

Law, p. 688, s. 492, and *Srimohan Thakur v. Macgregor* (1). He relied on *Purushottam v. Atmaram Janardan* (2).

[GREAVES J. You do not attack this sale as being fraudulent ?]

No, not against any party other than my mortgagee.

The Court has inherent power to recall any order made without jurisdiction: *Hiralal Mukerji v. Premamoyee Debi* (3).

Cur. adv. vult.

GREAVES J. This is an application made in a partition suit by the mortgagees of the plaintiffs' shares asking (i) to be added as parties and to be allowed to appear in all proceedings in this Court and before the Commissioner of Partition and the Receiver at their own costs, such costs to be added to their claim as mortgagees, (ii) for revocation of an order of the 9th August 1915, directing (*inter alia*) a sale of the one-fourth share of the premises Nos. 4 and 5, Jackson Ghât Street, which is one of the properties to be partitioned in the suit for the purpose of defraying the costs of the suit. Other relief is also sought. The suit was instituted on the 17th May 1910. The mortgages were respectively executed on the 5th August 1910, the 26th July 1911, the 29th May 1912 and the 30th August 1913, and purported to charge the plaintiffs' undivided half share in the estate of one Dinabandhu Das, which estate is the subject-matter of the partition suit.

A decree was made in the suit on the 4th January 1912, from which it appears that the plaintiffs were entitled to a one-third and not a one-half share in the

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(1) (1901) I. L. R. 28 Calc. 769, 787. (2) (1899) I. L. R. 23 Bom. 597.

(3) (1905) 2. C. L. J. 306, 308.

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estate of Dinabandhu Das, and the mortgagees charge their mortgagors, the plaintiffs and their attorneys with fraudulently representing that they were entitled to a one-half share, whereas they in fact knew that they were only entitled to a one-third share. On the 9th August 1915, an order was made by Mr. Justice Chaudhuri giving liberty to sell the moveables and the one-fourth undivided share of 4 and 5, Jackson Ghât Street, free from encumbrances for the purpose of paying the costs already incurred in the suit and the expenses of the partition.

The parties to the suit agreed among themselves that the one-fourth share in 4 and 5, Jackson Ghât Street, should be offered to the co-sharer for Rs. 35,000. A contract at this price was eventually entered into, not with the co-sharer but with another person whose name was disclosed at a late stage. The conveyance has been approved, the earnest money has been paid, and the 20th March last was fixed for completion.

I should say here that upon the materials before me the applicant has not satisfied me that the sale was not fair and aboveboard and that the price was not a fair one, and I see no grounds for believing, upon the materials before me, that the sale was collusive or fraudulent. So far as the applicant asks to be added as a party and to attend the proceedings at his own expense, I should have been disposed to accede to his application having regard to the conduct of the mortgagors, but I understand that he does not now desire this unless I am prepared to set aside the sale on the ground that Mr. Justice Chaudhuri's order was made without jurisdiction. This is the substantial question which has been argued before me. It is said that Mr. Justice Chaudhuri had no jurisdiction to make such an order as he did, as the one-fourth share of Nos. 4 and 5, Jackson Ghât Street cannot be partitioned

in this suit in the absence of the other co-sharers therein.

It is said that this is a suit for partition by metes and bounds, and there can be no partition by metes and bounds of a one-fourth undivided share, that there is no power to direct a sale, as such power only arises under the Partition Act, and a case like this does not fall within the provisions of the Act empowering a sale; and, lastly, it is said that there can be allotment of the share in the suit to one of the parties thereof as there could be no separate and exclusive user of an undivided one-fourth share.

For these reasons, it is said that Mr. Justice Chaudhuri's order was wrong and made without jurisdiction, and I am asked to so hold. I express no opinion as to the correctness or otherwise of the order of Mr. Justice Chaudhuri. I think it would be quite wrong for me to do so, and I know of no provision of the Code of Civil Procedure which empowers me to sit in appeal, as I am asked to do, upon Mr. Justice Chaudhuri's order. Section 152 of the Civil Procedure Code provides for the correction of clerical or arithmetical mistakes in orders, and this application certainly does not fall within the provisions of that section.

Order XLVII, rule 1 (the review order) provides for a review if there is some mistake or error on the face of the record, or if it is shown that the decision of the Court has proceeded upon a mistaken view of the law, and decided a case contrary to a decision which is binding upon the Court to which the application for review is made: see *Sharup Chand Mala v. Pat Dassee* (1), *Jatra Mohun Sen v. Aukhil Chandra Chowdhry* (2).

In the present case, I can find no mistake or error

(1) (1887) I. L. R. 14 Calc. 627. (2) (1896) I. L. R. 24 Calc. 334, 336.

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on the face of the record, nor have I been referred to any authority which has decided that an undivided share cannot be partitioned in a suit constituted like the present suit. Accordingly, in my opinion, the provisions of Order XLVII, rule 1, are not applicable to this case. Lastly, I was asked to say that the Court has inherent jurisdiction to review its own orders and that this is a case for the exercise of such jurisdiction. This may be so in a case of fraud or under special circumstances, but, in my opinion, the principle does not apply here.

I think, therefore, that this application is misconceived and that the Rule must be discharged with costs. But I direct the Taxing Officer in taxing the costs to disallow the entire costs of the affidavit of Shermull Parruck filed on the 4th April 1916. That affidavit sets out in full an enormous number of letters, most of which are quite immaterial, and the affidavit seems to me to be drawn entirely for the purpose of making costs.

I also direct the Taxing Officer to look carefully into the affidavit of Soshee Bhusan Dutt, filed on the 6th April 1916, to ascertain if, as was stated to me, it is practically in identical terms with other affidavits filed on this application, and if this so appears I direct him to disallow the costs of this affidavit.

L. R.

Rule discharged.

Attorneys for the applicants : *B. N. Basu & Co.*

Attorneys for the defendants : *J. N. Mitter, B. N. Mitter and N. N. Sen & Co.*

MATRIMONIAL JURISDICTION.*Before Sanderson C.J., Woodroffe and Mookerjee JJ.*

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May 8.

Divorce—Suit against wife—Wife found guilty of adultery—Decree nisi on husband's petition—Appeal—Wife's costs, application for—Liability of husband—Practice and procedure.

Where the wife has been herself found guilty of adultery by the Court of first instance and then actively brings the matter before the Court on appeal, the husband cannot be justly called upon by her as a matter of right to provide for her costs.

Robertson v. Robertson (1), *Otway v. Otway* (2), *Holt v. Holt* (3) referred to.

Per MOOKERJEE J. It is plain, however, that the doctrine in question is an encroachment upon the ordinary rule that costs follow the event, and, speaking for myself, I am of opinion that every attempt to extend its operation should be cautiously scrutinised.

APPLICATION by Beatrice Alice de Ste. Croix, the petitioner, pending her appeal against the decree *nisi* made by Greaves J.

Philip de Ste. Croix, the husband of the above-named petitioner and the opposite party in the present application, filed a petition for the dissolution of his marriage with his wife, to whom he had been married for 22 years, on the ground of adultery. The wife denied the adultery in her answer to her husband's petition. There was an interlocutory order by consent

* Application in the matter of an Appeal in Matrimonial Suit No. 21 of 1915.

(1) (1881) 6 P. D. 119.

(2) (1888) 13 P. D. 141.

(3) (1858) 28 L. J. (P. & M.) 12.

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made *pendente lite*, whereby the wife was entitled to be paid a sum of Rs. 340 monthly by her husband by way of alimony and also a specified sum towards her costs of the proceeding. On coming to trial the wife abandoned her denial of adultery, but pleaded condonation, connivance and collusion. Mr. Justice Greaves, by whom the suit was heard, found against her on all the issues raised by her and granted a decree *nisi* and awarded the husband the custody of the children of the marriage, two daughters, respectively 2) and 10 years old. His Lordship further directed the husband to pay the wife's costs of the suit and trial. Against this judgment and decree the wife preferred an appeal denying the charge of adultery, but seeking to test by way of appeal the correctness of the decree *nisi* on the grounds of condonation, connivance and collusion. Pending the hearing of this appeal, the wife applied to the Appellate Court for an order restraining the husband from sending the children of the marriage out of the jurisdiction of the High Court until the disposal of the appeal, and also for an order to make provision for the costs of her appeal to the said Court.

Mr. A. A. Avetoom, for the petitioner. The order of the Original Court with regard to the children was erroneous and should be set aside. Section 43 of the Divorce Act gave this Court the widest powers to deal with such an application as the present one. The case of *Symington v. Symington* (1) was relied on. In the passage at page 426 of the report of that case, beginning "if we take a man's children," etc., if instead of "man's" the word "woman's" was substituted, the *dictum* there set forth would be applicable to the present case. As regards the question of costs, the wife under the circumstances of the present case was

(1) (1875) L. R. 2 Sc. App. 415.

entitled to have her costs provided by her husband, and in support of this contention the passage in Halsbury's Laws of England, vol. 16, p. 561. sec. 1139, and the case of *Robertson v. Robertson* (1) were relied on. The case of *Otway v. Otway* (2) was referred to as *contra*.

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Mr. H. G. Pearson, for the opposite party. The interest of the children was the paramount consideration for the Court. In dealing with the present case, the Court must take into consideration what would be to their interest and pass such orders as would be beneficial for them. As to the question of costs, there appeared to be no reported decision in India, but the rule was to follow the English Divorce Practice in matters not specifically provided for in the Indian Divorce Act. What the English Divorce Practice was appeared from the case of *Otway v. Otway* (2). The practice of this Court always has been to follow the principle laid down in that case. See also *Fowle v. Fowle* (3) and *Earnshaw v. Earnshaw* (4) where the practice as formulated in *Otway v. Otway* (2) was applied to summary proceedings. The wife's conduct in the present case was not meritorious and as appellant she was not entitled to get her costs. The passage in Halsbury's Laws of England, vol. 16, p. 604, sec. 1235, was referred to in support of this contention.

Mr. Avetoom, in reply. The rulings in *Robertson v. Robertson* (1) and *Fowle v. Fowle* (3) were in favour of the wife's contentions and she was entitled to have her costs of the appeal secured.

[On the 17th April 1916 Sanderson C.J. and Woodroffe and Mookerjee JJ. delivered judgment with reference to the first part of the application,

(1) (1881) 6 P. D. 119.

(3) (1878) I. L. R. 4 Calc. 260.

(2) (1888) 13 P. D. 141.

(4) [1896] P. 160.

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namely, the restraining of the father from sending the children of the marriage out of the jurisdiction of the High Court until the disposal of the appeal, holding that it would be wrong for them to interfere with the discretion which the Court vested in the father who was the proper and legitimate guardian of the children under the circumstances of this case, and that that part of the application must be refused. With regard to the question of costs, the learned Judges took time to consider their opinion, and on the 8th May, 1916, they delivered the following considered judgments :—]

SANDERSON C. J. In this case the husband brought a suit for divorce, and the learned Judge granted him a decree *nisi* on the ground of the respondent's adultery; subsequently an application was made by her to this Court applying first of all that her husband should be restrained from sending the children of the marriage out of the jurisdiction of this Court. That matter was disposed of on the hearing of the application. It was further prayed that the petitioner in the divorce suit should be ordered to make provision for the costs of her appeal to this Court and we reserved our judgment upon that point.

The principle upon which the husband has been directed to make provision for his wife's costs in these cases has been laid down in *Robertson v. Robertson* (1), and the passage to which I wish to refer is at page 122. I am now reading from the judgment of Sir George Jessel where he says, "Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English

law, which gave the whole personal property of the wife to the husband and gave him also the income of her real estate, so that in the absence of a settlement (which, as we all know, is a comparatively modern introduction) she was absolutely penniless, and therefore the Ecclesiastical Court not only provided for the costs of her defence, but also gave her alimony *pendente lite* so as to provide for her maintenance." There is another passage at page 123 where the learned Master of the Rolls says, "I have given what I believe to be the true view of the origin of the liability of the husband; but I am not oblivious to the nobler view, if I may so express it, held in the House of Lords, that no gentleman, indeed, no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery. Really, if there had not been, as I do believe there is, the common and pecuniary reason for fixing the husband with the costs. I think that that reason ought to be sufficient to all right-minded men." That principle was endorsed by Lord Justice Brett and also by Lord Justice Cotton at pages 124 and 125. In a subsequent case, *Otway v. Otway* (1), there is a passage which is material at page 155, and it is to be noticed that this is a judgment of Lord Justice Cotton who was a party to the decision in *Robertson v. Robertson* (2). He says, "Then, as regards the appeal, I doubted very much whether we ought to allow any costs of the wife on the appeal, we having decided against her on the ground that she had already been found guilty of adultery before any of the proceedings in the appeal were taken. But I think the case we have been referred to of *Holt v.*

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(1) (1888) 13 P. D. 141.

(2) (1881) 6 P. D. 119.

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Holt (1) settles that question. If, after she had been found guilty of adultery, she had herself actively brought the matter before this Court, then I should have thought no provision ought to be made for her costs; but here she was only defending herself against a proceeding taken by the husband, and that being so, I think that, following what is laid down in *Holt v. Holt* (1), it was reasonable for her to instruct a solicitor and counsel to appear. Therefore, although her adultery prevented her from pledging the credit of her husband, and prevented her getting any alimony or allowance from the husband, yet, in my opinion, it does not prevent her from requiring her husband to provide for the costs reasonably incurred in bringing her case against his appeal before the Court. Therefore, I think we ought to allow her costs of this appeal as well as the costs of the proceedings in the Divorce Court." There is one other passage which I think is material to notice, and it is as follows: "There is one point I said I should mention, namely, with reference to the recent litigation as to the position of married women. If this marriage had been after the Act of 1882, we should have had to consider how far that old rule would apply where a woman was put, after that Act, in the position of a *feme sole* retaining all her property, and being in a position to sue and be sued." That observation would, of course, affect the principle which was referred to by Sir George Jessel in *Robertson v. Robertson* (2), at page 122, but it would not affect the second principle to which he refers at page 123, where he says, "but I am not oblivious to the nobler view held in the House of Lords that no gentleman, indeed, no man of right feeling would wish that his wife should not have the means of fairly investigating and fairly

(1) (1858) 28 L. J. (P. & M.) 12. (2) (1881) 6 P. D. 119

defending herself against so odious a charge as that of adultery."

Now, there are two passages in Halsbury's Laws of England, 16th volume, to which I think it right to refer, because each of them deals with the question of practice. At page 561 and in clause 1139 there is this to be found: "If a wife obtains a decree and her husband appeals, she is entitled to defend herself, and he must provide her costs of the appeal. The fact that she has committed adultery does not necessarily affect the matter; but if she, being herself found guilty, actively brings the matter before the Court, he need not make such provision." Then after that is cited *Otway v. Otway* (1). But there is a note to be found on the top of the notes at page 562 in which reference is made to an unreported case, *Campbell v. Campbell*, in which the House of Lords ordered the sum of £150 to be paid to the wife to enable her to carry on the appeal; and it is also noted that a similar result happened in the case of *Yelverton v. Longworth* or *Yelverton* (1864), not reported. It is not quite clear whether in either case the wife was the appellant, but as I read the words it looks to me as if she was the appellant. We have not had the opportunity of getting further information as to the record in either of the cases, and therefore I am entirely depending on the notes.

The other passage is at page 604 (that is Article 1235), and it is this, "where the wife, having obtained an order in the Court below, is the respondent to an appeal, the practice is to allow her costs of the appeal, even if it is successful, and the husband may be ordered to pay into Court or give security for her costs of the appeal, the hearing being stayed until he does so;

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but this practice has no application where the wife is the appellant."

As far as I know those are the only authorities or references to which our attention was drawn during the argument of this case. In my judgment we ought not to make an order that the husband should make provision for the costs of the wife's appeal in this case, having regard to the facts which are set out in the various affidavits which are now before the Court. I need not refer to these facts in detail, but it is sufficient to mention that during the course of the case it was stated by the lady's learned counsel in effect that she was not in a position to deny the adultery. Her case was based upon an allegation that her husband's conduct conduced to the adultery, and that he in fact condoned it. This case has been held to be unfounded by the learned Judge. As I have said before, I do not wish to enter into the details which are set out in the affidavits; but, in my opinion, the facts are not such as to justify us in making an order that the petitioner in the divorce suit should make provision for his wife's costs of the appeal. I wish to make it clear that I do not decide that this Court has no jurisdiction to make an order on the application of the wife who is an appellant to this Court; on the contrary I think this Court has jurisdiction to make such an order in a proper case if the Court thinks right so to do upon the facts of the case, even where the wife has had an order *nisi* made against her in the first Court, and where she herself is the appellant. I desire to confine my decision in this case simply and solely to the facts of this case, and to say that in this case the wife is not entitled to the order for which she asks.

WOODROFFE J. The petitioner prays that the respondent may be ordered to pay to the applicant's

solicitor such sum as may be fixed by the Registrar towards the costs of her appeal. The husband filed a suit for divorce alleging adultery, and the usual provision was made for the wife's costs. Though adultery was originally denied, it was and has been before us admitted and a decree was made for the dissolution. The petitioner wishes to appeal on the grounds of condonation, inducement to adultery and collusion which have disentitled the plaintiff to the relief notwithstanding the adultery found. On the statement of facts made to us at the hearing, there does not appear to be any substance in any of these grounds. It is unnecessary to decide the question of our power to make the order asked for. It is sufficient to say that I do not think that this is a case in which we should make such an order. I would, therefore, refuse the application.

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MOOKERJEE J. This is an application by a wife who has appealed against a decree *nisi* made by Mr. Justice Greaves on the 11th April 1916 in a suit for dissolution of marriage instituted by her husband on the ground of her adultery. The petitioner did not deny the charge of adultery, but pleaded condonation, connivance and collusion. These pleas were not established to the satisfaction of the trial Judge. The decree *nisi* was consequently made, and the custody of the children of the marriage, two daughters, was given to the husband. By a consent order made *pendente lite*, the petitioner is entitled to be paid a sum of Rs. 340 monthly by her husband by way of alimony and also a specified sum towards her costs of the proceeding; the decree further directs the husband to pay her costs of the suit and trial. In the present petition she prays, *first*, that her husband may be ordered to keep the children within the jurisdiction

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of the Court until the disposal of her appeal (with a view to enable her to have access to them) and not to send them away to Jersey as he intends to do; and, *secondly*, that her husband may be directed to pay to her solicitors such sum as may be fixed by the Court for and towards the costs of her appeal. The Court has already refused her first prayer on the ground that the paramount consideration in a matter of this description is the benefit of the children, and that in the present case it was not for their welfare that they should continue to reside here longer: *Symington v. Symington* (1), *D'Alton v. D'Alton* (2), *Phillips v. Phillips* (3). In fact, the Court, though not precluded from making an order giving the divorced wife access to the children, is most reluctant to make such an order and never places the indulgence of the parents above the welfare of the children: *Handley v. Handley* (4), *Kelly v. Kelly* (5)

The Court, however, took time to consider its decision upon the second prayer in the application. Reliance has been placed in support of that prayer on the principle that as a wife should not be precluded by want of means from establishing her case, either as a petitioner or respondent, the husband should make a deposit or give security for the estimated costs that might be incurred by her. One reason usually assigned for this rule is that the law assumes that on her marriage all the property of the woman presumably passes to her husband, so that, for her protection, it is necessary that not only should she not be made liable to pay costs, but that she should litigate at the expense of her husband: *Wells v. Wells* (6), *Clark v. Clark* (7), *Miller v. Miller* (8), *Milne v.*

(1) (1875) L. R. 2 Sc. App. 415.

(2) (1878) 4 P. D. 87, 91.

(3) (1872) 41 L. J. Matr. 89.

(4) [1891] P. 124.

(5) (1870) 5 B. L. R. 71.

(6) (1864) 3 Sw. & Tr. 542.

(7) (1865) 4 Sw. & Tr. 111.

(8) (1869) L. R. 2 P. & D. 13.

Milne (1), *Robertson v. Robertson* (2), *Smith v. Smith* (3), *Otway v. Otway* (4), *Earnshaw v. Earnshaw* (5). A second reason was assigned by Pigot J. in *Young v. Young* (6): "inasmuch as the wife, in discharge of her duties as mistress of the household, is wholly occupied, it is impossible for her to acquire any property, and that consideration might fairly be used to influence the Court in determining whether in cases, such as these, the wife might not be entitled to obtain the necessary costs from the husband, apart from any question of right to her property." A third reason sometimes assigned in justification of the rule is that as a wife can bind her husband for necessaries, her costs incurred in a litigation about her matrimonial status may be considered a necessity: *Jones v. Jones* (7), *Brown v. Ackroyd* (8). Whatever reasons historical or equitable may be discoverable in support of the rule, it has been generally followed in a long line of cases in this country, though sometimes not without reluctance: *Fowle v. Fowle* (9), *Proby v. Proby* (10), *Georgucopulas v. Georgucopulas* (11), *Thomson v. Thomson* (12), *Boyle v. Boyle* (13), *Mayhew v. Mayhew* (14), *Payne & Co. v. Pirojshah Nusserwanji Patel* (15), *Natall v. Natall* (16). It is plain, however, that the doctrine in question is an encroachment upon the ordinary rule that costs follow the event, and, speaking for myself, I am of opinion that every attempt to extend its operation should be cautiously scrutinised. In the case before us, the charge of

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(1) (1871) L. R. 2 P. & D. 202.

(9) (1878) I. L. R. 4 Calc. 260.

(2) (1881) 6 P. D. 119.

(10) (1879) I. L. R. 5 Calc. 357.

(3) (1882) 7 P. D. 84.

(11) (1902) I. L. R. 29 Calc. 619.

(4) (1888) 13 P. D. 141.

(12) (1887) I. L. R. 14 Calc. 580.

(5) [1896] P. 160.

(13) (1903) I. L. R. 30 Calc. 631.

(6) (1886) I. L. R. 23 Calc. 916n.

(14) (1894) I. L. R. 19 Bom. 293.

(7) (1872) L. R. 2 P. & D. 331.

(15) (1911) 13 Bom. L. R. 920.

(8) (1856) 5 E. & B. 819.

(16) (1885) I. L. R. 9 Mad. 12.

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adultery is not denied by the wife, but she seeks to test by way of appeal the correctness of the decision of the trial Judge on the special grounds she assigned with a view to resist a decree for dissolution of marriage, notwithstanding her misconduct. I can discover no reasonable ground on which her claim to be financed by her husband in the prosecution of her appeal in such circumstances can be justified. I can very well understand that if a wife obtains a decree and her husband appeals, she may be held entitled to defend herself and to require her husband to provide her costs of the appeal: *Holt v. Holt* (1), *Earnshaw v. Earnshaw* (2). The fact that she has committed adultery may not, in those circumstances, necessarily affect the matter. But if she, being herself found guilty, actively brings the matter before the Court, I cannot see how her husband may be justly called upon by her, as a matter of right, to provide for her costs. The view I take is in accord with that adopted by Cotton L. J. in *Otway v. Otway* (3): "if after she had been found guilty of adultery she had herself actively brought the matter before this Court, then I should have thought no provision ought to be made for her costs." [See also *Earnshaw v. Earnshaw* (2)]. I am not unmindful that the House of Lords has sometimes made an order on the husband to pay a round sum to his wife to enable her to carry on her case before the House of Lords: *Robinson v. Robinson* (4), *Keates v. Keates* (4), *Campbell v. Campbell* (5), *Yelverton v. Yelverton* (6). These cases are mentioned in note (e) to Art. 1139 in Vol. XVI of the Laws of England edited by Lord Halsbury. The circumstances under which the orders were made are, however, not stated,

(1) (1858) 28. L. J. (P. & M.) 12.

(4) (1859) unreported.

(2) [1896] P. 160.

(5) Unreported.

(3) (1888) 13 P. D. 141, 155.

(6) (1864) unreported.

nor are the reasons available. These cases consequently merely show that circumstances are conceivable, in which the Court may in its discretion make an order in favour of the wife; but they do not lay down an inflexible rule, and I cannot treat them as authorities which oblige me to hold that the application of the present petitioner should be granted. In my opinion, her second prayer must, like the first, be refused.

O. M.

*Application refused.*Attorneys for the petitioner: *Mitter & Bural.*Attorneys for the opposite party: *Orr, Dignam & Co.*

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CIVIL RULE.

Before Sanderson C. J., and Mookerjee J.

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*Mahomedan Law—Pre-emption—Exercise of right, when enforceable—
 Question of law, at what stage of case can be raised—Decree, nature of
 —When Court should take notice of events happening after institution
 of suit.*

A person who seeks the assistance of a Court with a view to enforce a right of pre-emption is bound to establish that the right existed at the date of the sale, at the date of the institution of the suit, and also at the date of the decree of the primary Court.

Ram Gopal v. Piari Lal (1) and *Tafazzul Husain v. Than Singh* (2) followed.

*Civil Rule, No. 326 of 1916, in Appeal from Appellate Decree No. 1107 of 1914.

(1) (1899) I. L. R. 21. All. 441.

(2) (1910) I. L. R. 32 All. 567.

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When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea.

Connecticut Fire Insurance Co. v. Karanagh (1) followed.

Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made.

Rai Charan Mandal v. Biswa Nath Mandal (2) referred to.

CIVIL RULE issued on an application for review of judgment by Nuri Mian, the defendant No. 1.

The plaintiff and defendant No. 2 were co-sharers of certain properties. Defendant No. 2 sold his shares in three villages to the defendant No. 1 on the 16th September, 1912. The case of the plaintiff was that he, on hearing of the sale for the first time on the 20th September, 1912, performed the required ceremonies known as *talab-i-movasibat* and *talab-i-istishad* and instituted this suit on the 8th October, 1912. The defendant No. 1 contested the suit and traversed the allegations made in the plaint.

The property in dispute was the subject of partition proceedings from the 15th May, 1909 to the 2nd September, 1913, the order of the Collector being passed on the latter date.

The Subordinate Judge dismissed the plaintiff's suit on the 16th January, 1914. On appeal to the District Judge, he reversed the judgment and decree of the Court of first instance and decreed the suit. On second appeal to the High Court, the appeal was

(1) [1892] A. C. 473, 480.

(2) (1914) 20 C. L. J. 107.

dismissed. Defendant No. 1 thereupon applied for review of judgment of the High Court.

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Maulvi Khursed Hussain, for the petitioner. The plaintiff pre-emptor ceased to be a co-sharer before the decree of the Court of first instance and he cannot get a decree for pre-emption: *Ram Gopal v. Piari Lal* (1) and *Tafazzul Husain v. Than Singh* (2).

Babu Sarat Chandra Ray Chowdhury, for the opposite party. In order that a plaintiff in a suit for pre-emption might succeed, all that is necessary is that the plaintiff should remain a co-sharer up to the date of the institution of the suit for pre-emption: *Sakina Bibi v. Amiran* (3), *Rohan Singh v. Bhau Lal* (4) and *Janki Prasad v. Ishir Das* (5).

[Rule No. 326 of 1916.]

SANDERSON C. J. In this case the action was for pre-emption. The suit was dismissed by the Court of first instance on the 16th of January 1914. But on appeal to the District Judge, that decision was reversed and the District Judge decreed the suit, holding as a matter of fact that the ceremonies had been duly performed, that the defendant purchaser was not a co-sharer and that the property was joint property at the time of the institution of the suit. From that the defendant appealed to the High Court, and that appeal was dismissed by the two learned Judges who constituted the Bench on that occasion. Then a Rule was obtained by the defendant calling upon the plaintiff to show cause why that judgment should not be reviewed upon three grounds, the main ground being that the conditions which were necessary to

- (1) (1899) I. L. R. 21 All. 441. (3) (1888) I. L. R. 10 All. 472.
(2) (1910) I. L. R. 32 All. 567. (4) (1909) I. L. R. 31 All. 530.
(5) (1899) I. L. R. 21 All. 374.

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give a right to the plaintiff to pre-emption did not exist at the date of the decree, and that is the point which has been mainly argued, and, if I may say so, very well argued by the learned vakils. In order to appreciate the point it is necessary to state three or four facts. One Bansidhar sold his interest in the property on the 12th of July, 1912, to the first defendant whose name was Nuri Mian, and at that time there were partition proceedings pending. On the 8th of October, 1912, the plaintiff instituted the present suit to assert his right of pre-emption. The partition proceedings were completed on the 2nd of December, 1913, by reason of the issue of the notice under section 92 of Estates Partition Act. The first decree in this suit, as I have already mentioned, was on the 16th of January, 1914, after the date when the partition proceedings were completed. In that decree the defendants succeeded, and it was not until the 7th of April, 1914 when the District Judge's decision was given that the plaintiff got his decree for pre-emption. I do not think it matters which of the dates is taken, whether the 16th of January, 1914 or the 7th of April, 1914, because both of them are subsequent to the 2nd of December, 1913, when the partition proceedings were completed.

Now, the point taken by the learned vakil on behalf of the defendants is that in such a case as this, namely, in a suit for pre-emption, the right of the plaintiff to get pre-emption must exist not only at the time of the sale, but also at the time of the institution of the suit, and finally up to and at the date of the decree. The principle is thus stated in Sir R. K. Wilson's Digest of Anglo-Muhammadan Law at page 400: "The Co-sharership, 'participation in appendages' or ownership of contiguous property, as the case may be;" this being a case of co-sharership "must not only exist at the time of the sale which gives

rise to the claim of pre-emption, but must continue to exist down to the time when the suit is instituted and (it seems) even down to the decree." Of course, that is not an authority, and I do not refer to it as an authority, but I only refer to it for the purpose of stating what is considered by the text writers as the principle. The question remains whether that principle is right.

Now, both on the ground of principle and also by reason of the authorities to which Mr. Ray Chowdhury has very rightly drawn our attention, although some of them are in my opinion directly against him, I think this Rule must be made absolute. The principle, I think, cannot be better stated than it is, in the case of *Tafazzul Husain v. Than Singh* (1), where the judgment was given at page 570. That was a case in which partition proceedings had taken place, and at the time of the decree the property was no longer a joint property. The learned Judges said there: "We think that the decisions of the Courts below were correct. The plaintiff's right was based upon the fact that he was partner with the vendor." To quote Hamilton's Translation of the Hedaya, *shafa* relates to a thing held in joint property and which has not been divided off. The right of *shafa* is founded on a precept of the Prophet who had said, "the right of *shafa* holds in a partner who has not divided off and taken separately his share." I pause there to say that I think that is the principle which applies to this case; the plaintiff's right was based upon the fact that he was a partner with the vendor; at the time of the sale he was a partner with the vendor; at the time of the institution of the suit he was a partner with the vendor; but at the time the decree was made, in

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1914, the joint property had ceased to exist, for the property had been divided into different shares which had become the separate property of the individuals who were entitled to the shares under the partition proceedings; and it seems to me it would be impossible to make a decree upon the basis upon which the plaintiff's claim was put forward in this action. Then the learned Judges went on to say. "Having regard to what has happened, the plaintiff's property has been divided off. He is no longer a partner with the vendor. It is argued that inasmuch as the plaintiff was a partner at the time of the institution of the suit, it therefore does not matter that a partition has since taken place, particularly if the plaintiff was not the person who sought partition. Evidently the plaintiff did feel that if he had prosecuted the partition, it would be fatal to his suit, and this perhaps explains why he withdrew from the application for partition which he himself made in the first instance. It is expressly laid down in the Hedaya, Chapter IV, Book 38, that it is a condition that the property of the *shafi* remain firm until the decree of the Qazi be passed; and for this reason if the *shafi* previous to the decree of the Qazi sell the house from which he derives his right of *shafa*, the reasons or grounds of his right being thereby extinguished, the right itself is invalidated. Applying the same principle to the present case, plaintiff's right of *shafa* was founded upon the fact that he was a partner, that is to say, a co-sharer in the *mahal*. He has ceased to be such co-sharer. Therefore, the reasons or grounds of his right had been extinguished before the decree of the Court, and therefore the right itself is also extinguished." I think that those words apply directly to this case, and I propose to follow the decision in that case, and also to say that in my judgment that decision is based upon sound reason and

principle, and therefore I think this Rule must be made absolute.

MOOKERJEE J. I agree that this Rule issued on the application for review, which raises an important question of law of first impression, so far as this Court is concerned, must be made absolute.

The plaintiff seeks to enforce his right of pre-emption under the Mahomedan law in respect of shares in three villages sold on the 12th July, 1912, by his co-sharer, the second defendant, to the first defendant. He instituted this suit on the 8th October, 1912, on the allegation that he had performed all the ceremonies requisite under the Mahomedan law. The Subordinate Judge dismissed the suit on the 16th January, 1914. Upon appeal the District Judge gave the plaintiff a decree on the 7th April, 1914. An appeal from the decree of the District Judge was dismissed by this Court (Sharfuddin and Roe JJ.) on the 19th January, 1916; and this is the judgment we are now invited to review.

The ground on which the application for review is made was admittedly not taken at any stage of the proceedings, and it has been argued on behalf of the opposite party that the petitioner should not be allowed to base his application on a ground never taken before. In my opinion, there is no force in this contention. In the first place, as was pointed out by the Judicial Committee in the case of *Connecticut Fire Insurance Co. v. Kavanagh* (1), "When a question of law is raised for the first time in a Court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The

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expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below." Here the ground assigned in support of the application for review raises a pure question of law, and its determination does not depend upon the investigation of new facts. In the second place, the alleged error, if it be an error, is apparent on the face of the record. The petitioner contends that the suit should not have been decreed, inasmuch as the right of pre-emption had been lost before the date of the decision of the Subordinate Judge in the Court of first instance. This argument is based on admitted facts. The case was decided by the Subordinate Judge on the 16th January, 1914. The District Judge made his decree on the 7th April, 1914; that decree may, by a fiction, be deemed to have been made as early as the 16th January, 1914, inasmuch as the District Judge only made that decree which, in his opinion, should have been made by the trial Court. The property was the subject of a proceeding for partition under the Estates Partition Act, 1897, instituted before the Collector on the 15th May, 1909. The partition proceedings were completed on the 2nd September, 1913; and, consequently, on that date the subject-matter of the litigation ceased to be joint property. The petitioner contends in essence that as the plaintiff ceased to be a co-sharer in the joint property on the 2nd September, 1913, his right of pre-emption was extinguished on that date and consequently no decree for pre-emption could be made thereafter on the 16th January, 1914. If this argument is well founded on principle, the error assigned is apparent on the face of the record. I hold accordingly that the application

for review must be entertained and considered on its merits.

The substance of the argument for the petitioner is that any person who seeks the assistance of a Court with a view to enforce a right of pre-emption is bound to establish that the right existed at the date of the sale, at the date of the institution of the suit and also at the date of the decree of the trial Court. In support of this contention, reliance has been placed upon the decisions in *Ram Gopal v. Piari Lal* (1) and *Tufazzul Husain v. Than Singh* (2). On behalf of the opposite party the correctness of these decisions has been called in question, and we have been invited to apply the rule that the decree in a suit should conform to the rights of the parties as they stood at the date of its institution. Now, it may be conceded that ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But this principle is not of universal application, and in a long series of decisions which will be found reviewed in the case of *Rai Charan Mandal v. Biswa Nath Mandal* (3), the doctrine has been recognised that there are cases where it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. This principle will be applied where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties. In my opinion, the case before us falls within this exception to the general

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(1) (1899) I. L. R. 21 All. 441.

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(3) (1914) 20 C. L. J. 107.

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rule, and the decree herein should be made in accordance with the circumstances as they stood at the date of the decree of the trial Court, because otherwise the decree, if made in conformity with the prayers in the plaint, would be inappropriate and would not do complete justice between the parties. This may be well illustrated by a reference to the prayer in the plaint itself. The plaintiff seeks a declaration of his title to specified shares in the three villages mentioned in the schedule, and prays that he may be placed by the Court in possession of such shares. The decree of the District Judge is in strict conformity with these prayers in the plaint. But it has not been seriously disputed that the decree so awarded to the plaintiff is incapable of execution by reason of events which have happened since the institution of the suit. The joint property has, during the pendency of the litigation in the trial Court, become transformed into several separate estates, and it is impossible in execution of the decree awarded to the plaintiff to place him in possession of a share in the joint property as claimed by him in the plaint. It was, indeed, faintly suggested on his behalf that the decree might be modified so as to entitle him to recover possession of the allotment made in favour of the first defendant. The obvious answer is that such relief, if awarded, would be inconsistent with the prayer in the plaint and with the fundamental notion of pre-emption which lies at the root of that prayer. This, then, is obviously a case where a decree cannot be made in favour of the plaintiff in strict accord with the terms of the prayer in the plaint. The question consequently arises, what decree should be made in favour of the plaintiff; is he entitled to the specific relief claimed by him or to any substituted relief? In my opinion, the answer must be in the negative.

The true foundation of the right of pre-emption is explained in two passages in Book XXXVIII of the Hedaya. The first of these passages is in these terms: “*shafa* in the language of the law signifies the becoming proprietor of lands sold for the price at which the purchaser has bought them, although he be not consenting thereunto. This is termed *shafa*, because the root from which *shafa* is derived signifies conjunction, and the lands sold are here conjoined to the land of the *shafee*, or person claiming the right of pre-emption.” This indicates that the right of pre-emption is a right of substitution. The plaintiff complains that his co-sharer has transferred his share in the joint property to a stranger, and claims to be substituted in the place of the purchaser of the share of the joint property. If, before this can be effected, the property ceases to be joint property, it is obvious that the foundation of the right of pre-emption disappears. This view is fortified by the second passage which is in these terms: “It is an express condition of *shafa* that a man be firmly possessed of the property from which he derives his right of *shafa* at the time when the subject of it is sold, a condition which does not hold on the part of the heirs.” (The author here deals with a case where the person claiming the right of pre-emption has died before a decree is made in his favour by the Qazi.) “It is, moreover, a condition that *the property of the shafee remain firm until the decree of the Qazi be passed*; and as this does not hold on the part of the deceased *shafee*, the *shafa* is therefore not established with respect to any one of his descendants, because of the failure of its conditions.” It has not been seriously disputed by the plaintiff that the right of pre-emption, in order that it may be enforced by a Court, must not only arise on the sale, but be also existent at the date of

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the institution of the suit; for it is unquestionable upon the authorities that if a person, who claims a right of pre-emption, ceases to be interested in the joint property before the institution of the suit, he cannot obtain assistance from the Court. Consequently, the view cannot be maintained that the right of pre-emption which arises from the moment the sale is effected by the co-sharer is enforceable as it stands at the time of its origin; it is liable to be extinguished by events subsequent. The only point of difference between the plaintiff and the defendant is, whether the point of time with reference to which the existence of the right is to be determined is the date of the institution of the suit or the date of the decree by the trial Court. In my opinion, for the reasons already assigned, it is plain that the right must exist and retain its enforceable character when the decree is made by the primary Court. This view was adopted in *Ram Gopal v. Piari Lal* (1) and *Tafazzul Husain v. Than Singh* (2); these decisions are mentioned without dissent by well-known text writers such as Amir Ali, Tyabji and Wilson. It is also worthy of note that the Chief Court of the Punjab has accepted the same view in *Sanwal Das v. Gur Parshad* (3), though a contrary view had been adopted in an earlier case, *Faiz Baksh v. Ramjidas* (4). In the case just mentioned, which was decided by a Full Bench of eight Judges, the nature of the right of pre-emption was fully analysed by Chief Justice Clark and Mr. Justice Chatterjee. Mr. Justice Chatterjee observed as follows: "A pre-emptor is bound to show that he was clothed with the right at the date of sale and also at that of suit and up to the time of the final decree, or should have his claim dismissed If the

(1) (1899) I. L. R. 21 All. 441.

(3) (1908) 10 Punj. L. R. 561.

(2) (1910) I. L. R. 32 All. 567.

(4) (1875) Punj. Rec. 34.

pre-emptor loses his right within the period mentioned above, whether by his own act or from causes beyond his control, his suit fails. . . . The pre-emptor cannot get a decree unless he maintains the right on which he sues to the end." Mr. Justice Clark added that "conceding that the plaintiff pre-emptor must retain the prior right up to the time of institution of suit ("and even up to decree)" a plaintiff must have a subsisting cause of action up to the time of the decree. The possession of the property in which the right of pre-emption inheres is a part of his cause of action, and if he loses that property either voluntarily or involuntarily before decree, his suit must fail." This is obviously consistent with sound sense, for if the contrary opinion were accepted, the result would follow that relief by way of pre-emption may be awarded to a person who, according to the altered circumstances as they exist at the date of the decree, can show no reason whatever why he should be placed in that position of advantage.

Accordingly I agree that this Rule must be made absolute, and the decree of this Court discharged. I also concur in the order which the Chief Justice proposes to make in the appeal and in respect of the costs of the Rule and the appeal.

[*Appeal No. 1107 of 1914.*]

SANDERSON C. J. This is now to be taken as the hearing of the appeal, and I would like to say this to show that I have not overlooked the point taken by the learned vakil for the plaintiff. It was clearly within our jurisdiction to hear the Rule, and the hearing of the appeal is a natural consequence under the Rule as was mentioned by my learned brother Mr. Justice Mookerjee, and of the fact that we made the Rule absolute. In my opinion we have

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jurisdiction to hear it, but if there is any doubt about it, I give direction under the second *proviso* of clause 39 of the Letters Patent of the Patna High Court that this appeal should be heard in this Court.

With regard to the costs, we have considered the matter carefully, and we think that the proper order to make is that the appeal will be allowed and the judgment of the Court of first instance by which the suit was dismissed will be restored. The plaintiff will pay the defendant's costs incurred in the Court of first instance and in the first Appellate Court, but there will be no costs with regard to the proceedings in the High Court either with regard to the appeal or with regard to the Rule, with the exception that we think that the plaintiff should pay the court-fee which was paid on the memorandum of appeal, which we understand is Rs. 150.

The money deposited by the plaintiff will be returned to him.

S. M.

Rule absolute ; appeal allowed.

CRIMINAL REFERENCE.

Before Moo'kerjee and Sheepshanks JJ.

RAIMOHAN KARMAKAR

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June 7.

Public Pathway—Obstruction—Proceedings against several without statement of particular acts of obstruction done by each—Initial and final orders, vague—No reasonable opportunity given to show cause and adduce evidence—Legality of order based on local inquiry or information at time of conditional order—Criminal Procedure Code (Act V of 1898), ss. 133, 136, 137.

In a proceeding under s. 133 of the Criminal Procedure Code against several persons, alleging various acts of unlawful obstruction to a public way, the initial and final orders must state accurately the specific obstruction caused by each, and which he is required to remove, unless it is alleged that all of them are jointly responsible for all the obstructions complained of.

An order under the section should not be vague, indefinite or ambiguous, but such as to afford information by its terms to the person to whom it is directed what he is to do in order to comply with it.

Kali Mohan Kar v. Nakari Chandra Das (1) followed.

It is desirable that reasonable opportunity should be given the parties proceeded against under s. 133 to show cause under s. 135 (b) or adduce evidence under s. 137 (1).

The report or other information on which the Magistrate has passed the conditional order under s. 133, is not evidence against the person to whom it is directed.

Srinath Roy v. Ainaddi Halder (2) approved.

An order under s. 133 cannot, even by consent of parties, be based on information gathered at a local inquiry.

Upendra Nath Mandal v. Rampal (3) approved.

* Criminal Reference No. 81 of 1916, by M. Smither, Sessions Judge of Dacca, dated May 25, 1916.

(1) (1909) 11 C. L. J. 114.

(2) (1897) I. L. R. 24 Calc. 395.

(3) (1909) 10 C. L. J. 482.

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ON the 21st February 1916, the President Panchayet of the Hashara Union, in the district of Dacca, reported to the Subdivisional Officer of Munshigunj that the *halat* from the Bazar to Teghoria had been destroyed by several persons (of whom six were named) who had "either dug earth therefrom, excavated a pond, or ploughed up the land and included it in their holdings." On the 4th March, the Magistrate directed proceedings under s. 133 of the Criminal Procedure Code to be taken against the persons named to show cause, on the 24th March, why they should not remove the said obstructions. A proceeding or initial order under s. 133 was accordingly drawn up in form xvi to Schedule V of the Code against the six persons jointly, stating that they had obstructed the said *halat* "by digging earth, excavating a pond or extending your ploughed land," and requiring them to remove the obstructions within seven days or show cause on the 24th March.

No copy of the order was sent to the parties, but summonses to appear were served on them on the 21st March. On the 24th instant, one appeared and consented to the order, two others applied for an adjournment to file written statements which was refused. The remaining three did not appear. The Magistrate made the order absolute against all without taking any evidence, and a notice was thereupon issued on them to remove the obstructions immediately.

Neither the initial nor the final orders specified the particular act or acts of obstruction each had committed, nor what particular obstruction each was required to remove.

The Additional Sessions Judge reported the case to the High Court under s. 438 of the Code recommending the reversal of the final order.

No one appeared at the hearing of the Reference.

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MOOKERJEE AND SHEEPSHANKS JJ. This is a reference by the Sessions Judge of Dacca, under section 438 of the Criminal Procedure Code, in the matter of a proceeding under section 133.

On the 21st February 1916, the President Panchayet of the Hashara Union reported to the Subdivisional Magistrate of Munshiganj that the *halat* from the Hashara Bazar to Teghoria had been destroyed by several persons (6 of whom were mentioned in his list) "who had either dug earth therefrom, or excavated a pond, or had ploughed up the land and included it in their holdings." On the 4th March, the Magistrate directed proceedings to be drawn up against all the persons to show cause why they should not remove the obstructions mentioned; by the same order he fixed the 24th March for the hearing of the case. A proceeding was then drawn up against the six persons jointly requiring them to remove the obstructions mentioned within seven days or to show cause on the 24th March why the order should not be confirmed. The order, however, in the form No. xvi of Schedule V of the Criminal Procedure Code, was not drawn up and signed till the 14th March and was not made over to the peon till the 18th March. His return shows that the order was not served till the 21st March. On the date fixed, one of the six persons mentioned in the notice appeared and stated that he had no objection to remove the obstruction, and the order was made absolute against him; three of the others were absent and the order was made absolute against them under section 136. The remaining two persons appeared and prayed for an adjournment to enable them to file a written statement. The Magistrate refused the application and made the order absolute against them also.

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Pursuant to this order a notice was issued upon them that they do remove the obstruction immediately on receipt of the notice. The Sessions Judge has, upon the application of these two persons, who had appeared to show cause under section 135, recommended that the order be set aside on two grounds, namely, *first*, that the petitioner had not sufficient opportunity to show cause against the order; and, *secondly*, that the proceedings were defective, because the initial as well as the final order was not sufficiently precise. We are of opinion that these objections are well founded.

The initial order under section 133, though made on the 4th March, was not served till the 21st March. The reason for the delay has not been explained; but the result has been that the petitioners had only two days to enable them to show cause. Their application for an adjournment was thus not unreasonable. It cannot be overlooked that a proceeding under section 133 is, in the first instance, entirely *ex parte*, and, as pointed out in *Srinath Roy v. Ainaddi Halder*(1), the report or the other information whereon the Magistrate has taken action before making the conditional order is no evidence against the opposite party. It is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by section 135, clause (b), and to adduce evidence as prescribed by section 137 (1). In the case before us we agree with the Sessions Judge that the petitioners had not such opportunity given to them. We may add that the Magistrate in his Explanation relies upon the result of an inspection he had made of the locality in the course of a tour long previous to the institution of the proceedings. It may be pointed out, as explained in *Upendra Nath Mandal v.*

Rampal (1), that an order under section 133 cannot, even by consent of parties, be based upon information gathered at a local enquiry.

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It is further plain that the initial order is not sufficiently specific. When in a proceeding under section 133, instituted against a number of persons, it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order should state accurately, with regard to each person, the specific obstruction made by him, which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned. No person can be called upon, under section 133, to remove an obstruction not caused by himself. In the case before us, there is no allegation that the unlawful obstructions imputed to the opposite party had been caused by all of them jointly; on the other hand, from the report of the President Panchayet it seems that different persons had caused different obstructions. In these circumstances, a joint initial order, which does not specify what obstruction each person called upon to show cause has made, followed by a joint order absolute which does not specify what each member of the opposite party is required thereby to do, cannot be supported. As was pointed out by Jenkins C. J. in *Kali Mohan Kar v. Nakari Chandra Das* (2), an order issued under section 133 should not be vague and indefinite or ambiguous, but must be such that the persons to whom it is directed may be able to learn from its terms what it is that they are to do for the purpose of complying with it. This is no trivial matter, for, under section 140, disobedience to the order renders the defaulter liable to serious penal consequences, namely, to a prosecution under section 188 of the Indian Penal Code.

(1) (1909) 10 C. L. J. 482.

(2) (1909) 11 C. L. J. 114.

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We accordingly accept the recommendation of the Sessions Judge and set aside the order of the Magistrate dated the 24th March 1916.

E. H. M.

CRIMINAL REFERENCE.

Before Mookerjee and Sheepshanks JJ.

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June 10.

ARFAN ALI

v.

EMPEROR.*

Theft—Dishonest intent—Bonâ fide claim of right to property, or mere pretence—Proper question for consideration by the Criminal Courts—Criminal trespass—Evidence of complainant's possession, illusory—Penal Code (Act XLV of 1860) ss. 379, 447.

The removal of property in the assertion of a *bonâ fide* claim of right, though unfounded in law and fact, does not constitute theft. But a mere colourable pretence to obtain or keep possession of property does not avail as a defence.

Whether the claim is *bonâ fide* or not must be determined upon all the circumstances of the case, and a Court ought not to convict unless it holds that the claim is a mere pretence.

Rex v. Hall (1), *Reg. v. Wade* (2), *Rex v. Jenner* (3), *Reg. v. Leppard* (4), *Nassib Chowdhry v. Nannoo Chowdhry* (5), *Runnoo Singh v. Kali Churn Misser* (6), *Mahomed Jan v. Khadi Sheik* (7), *Khetter Nath Dutt v. Indro Jalia* (8), *Empress v. Budh Singh* (9), *In re Madhab Hari* (10), *Pandita v. Rahimulla Akunão* (11), *Emperor v. Sabalsang* (12), *Algarasawmi Tevan v. Emperor* (13), *Hari Bhuimali v. Emperor* (14) followed.

* Criminal Reference No. 86 of 1916, by H. C. Liddell, Sessions Judge of Sylhet, dated May 30, 1916.

(1) (1828) 3 C. & P. 409.

(8) (1871) 16 W. R. Cr. 78.

(2) (1869) 11 Cox 549.

(9) (1879) I. L. R. 2 All. 101.

(3) (1829) 7 L. J. M. C. (O. S.) 79.

(10) (1887) I. L. R. 15 Calc. 390n.

(4) (1864) 4 F. & F. 51.

(11) (1900) I. L. R. 27 Calc. 501.

(5) (1871) 15 W. R. Cr. 47.

(12) (1902) 4 Bom. L. R. 936.

(6) (1871) 16 W. R. Cr. 18.

(13) (1904) I. L. R. 28 Mad. 304.

(7) (1871) 16 W. R. Cr. 75.

(14) (1905) 9 C. W. N. 974.

Held, upon the facts, that even if the accused had failed to establish his title and possession to the land, it was a case of a *bond fide* dispute, and that the conviction of theft was bad.

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ON the 17th March one Suraj Ali filed a complaint against the accused, Arfan Ali, stating that the latter with two others had cut and removed eight bamboos from a clump on his *ilam* land covered by pottah No. 12, and had also filled in a pit on another plot of land belonging to him, included in pottah No. 15. The accused was tried by an Honorary Magistrate under ss. 379 and 447 of the Penal Code. He claimed the land of pottah No. 12 and the bamboo clump as his own and in his possession, and that of pottah No. 15 as the property, and in the possession, of his cousin Abdul Sobhan. It appeared that the accused was the *malik* of the land of pottah No. 12, and that his name had been entered as such in certain recent survey proceedings. The evidence of possession by the complainant of the bamboo clump was unconvincing, and the proof of his title shadowy. There was no evidence that he was in possession of the land of pottah No. 15, while his title was illusory. On the other hand there was reliable evidence that it was in the possession of Abdul Sobhan, who paid revenue for it. The name of the complainant did not appear in either pottah.

The Magistrate convicted the accused under the above-named sections and sentenced him to small fines. The Sessions Judge of Sylhet referred the case to the High Court, under s. 438 of the Criminal Procedure Code, recommending the reversal of the convictions and sentences. As to the charge of theft, he held that there was no proof of title or possession in the complainant, but that the title lay with the accused as a co-sharer, and no possession adverse to his had been established; and, finally, that there was a complete want of dishonest intent. He was of opinion, with

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reference to the charge of criminal trespass, that there was no evidence of the complainant's possession of the land, but that it was rather against such claim.

No one appeared in the Reference.

MOOKERJEE AND SHEEPSHANKS JJ. The complainant Suraj Ali and the accused Afran Ali are cousins. On the 17th March 1916 Suraj Ali lodged a complaint against Arfan Ali that the latter, along with two others, had, on the 14th March, cut away eight bamboos from his *ilam* land, and had also filled in a pit made by his sons on another plot of land with a view to catch fish. Arfan Ali was placed on his trial before an Honorary Magistrate and was charged with offences under sections 379 and 447 of the Indian Penal Code, namely, *first*, that he had dishonestly cut and removed eight bamboos from land in pottah No. 12 in the possession of Suraj Ali; and, *secondly*, that he had committed criminal trespass on complainant's land in pottah No. 15 with intent to fill in a pit made by his sons. The defence in substance was that the land of pottah No. 12 belonged to the accused and was in his possession, and that he had lawfully taken his own bamboos. He further denied that he had filled in any pit, and stated that the land in pottah No. 15 was the property of his cousin, Abdul Sobhan, who was in possession thereof. The Honorary Magistrate has convicted the accused and has sentenced him to pay a fine of Rs. 5 and Rs. 3 under sections 379 and 447, respectively, in default to suffer rigorous imprisonment for five days under each section. The Sessions Judge has recommended that the convictions and sentences be set aside, as the elements necessary for a conviction for theft and criminal trespass have not been established. We are of opinion that the view taken by the Sessions Judge is correct.

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To sustain a conviction under section 379, it is necessary to prove a dishonest intention to take property out of the possession of another person. Consequently, where property is removed in the assertion of a *bonâ fide* claim of right, the removal does not constitute theft. The claim of right must be an honest one, though it may be unfounded in law or in fact. If the claim is not made in good faith, but is a mere colourable pretence to obtain or to keep possession, it avails not as a defence. In the present case, the accused admits that he did cut the bamboos, but he maintains that the bamboo clump is his property and is in his possession. Now, even the witnesses for the complainant admit that the accused is proprietor of the land in pottah No. 12. The name of the accused is in the pottah, while the name of the complainant is not to be found there. No reason is assigned for the absence of his name, should he really be a co-sharer. He admits that he does not know the area of the land included in pottah No. 12. His witnesses seek to establish that he pays revenue through his cousin, the accused, but he himself does not venture to assert this. Then, again, while some of the witnesses seek to make out an amicable partition between the co-sharers, the complainant does not make any such allegation. The evidence of exclusive possession by the complainant of the bamboo clump, is, as the Sessions Judge rightly observes, extremely unconvincing, while the proof of his alleged title is even more shadowy. Consequently, even if we do not hold that the accused has established his title and possession, there is no room for controversy that this is a case of *bonâ fide* dispute as to title and possession, and the accused cannot be held to have dishonestly cut and removed the bamboos. The principle applicable in circumstances like these is well settled and

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is stated in works of high authority. Sir Matthew Hale in his *Pleas of the Crown* (Vol. I, pp. 508, 509) observes in his quaint style, "it is the mind that makes the taking of another's goods to be a felony or a bare trespass only, but because the intention and mind are secret, the intention must be judged by the circumstances of the fact, and though these circumstances are various and may sometimes deceive, yet regularly and ordinarily these circumstances following direct in this case. If *A*, thinking he hath a title to the horse of *B*, seiseth it as his own, or supposing that *B* holds of him, distrains the horse of *B* without cause, this regularly makes it no felony, but a trespass, because there is a pretence of title; but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it." To the same effect is Sir Edward Hyde East in his *Pleas of the Crown* (Vol. II, p. 659): "in any case, if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the Court will direct an acquittal; for it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy." Hawkins puts the matter in much the same way in his *Pleas of the Crown* (Vol. I, Book I, Ch. 19, sec. 12): see also *Rex v. Hall* (1), *Reg. v. Wade* (2), *Rex v. Jenner* (3), *Reg. v. Leppard* (4). The same principle has been recognised and applied in a long line of cases in Indian Courts: *Khetter Nath Dutt v. Indro Jalir* (5), *Hari Bhuimali v. Emperor* (6), *Algarasawmi Tevan v. Emperor* (7), which show that a conviction for theft cannot be sustained if there

(1) (1828) 3 C. & P. 409.

(4) (1864) 4 F. & F. 51.

(2) (1869) 11 Cox 549.

(5) (1871) 16 W. R. Cr 78.

(3) (1829) 7 L. J. M. C. (O. S.) 79.

(6) (1905) 9 C. W. N. 974.

(7) (1904) I. L. R. 28 Mad. 304.

is a *bonâ fide* assertion of a claim of right, but a mere assertion of a claim does not oust the jurisdiction of the Criminal Court; whether the claim is honest must be decided by the Court from all the circumstances of the case, and, as has been said, it should not convict unless it is in a position to say that the claim is a mere pretence: *Nassib Chowdhry v. Nannoo Chowdhry* (1), *Runnoo Singh v. Kali Churn Misser* (2), *Mahomed Jan v. Khadi Sheik* (3), *In re Madhab Hari* (4), *Pandita v. Rahimulla Akundo* (5), *Empress v. Budh Singh* (6), *Emperor v. Sabal-sang* (7). In the case before us, we agree with the Sessions Judge that there is a complete absence of any indication of dishonest intention and that, consequently, the conviction under section 379 cannot be supported.

As regards the conviction under section 447, there is really no evidence that the complainant is in possession of the lands of pottah No. 15, while the evidence as to his title is still more illusory than in the case of pottah No. 12. On the other hand, there is reliable evidence that Abdul Sobhan holds possession of the land of pottah No. 15 and pays revenue for it. In these circumstances, it is impossible to hold that the accused entered into any land in the possession of the complainant with intent to commit an offence or to annoy the person in possession thereof: *Empress v. Budh Singh* (6), *In re Shistidhur Parui* (8). The conviction under section 447 cannot accordingly be sustained.

We accept the recommendation of the Sessions

(1) (1871) 15 W. R. Cr. 47.

(2) (1871) 16 W. R. Cr. 18.

(3) (1871) 16 W. R. Cr. 75.

(4) (1887) I. L. R. 15 Calc. 390 N.

(5) (1900) I. L. R. 27 Calc. 501.

(6) (1879) I. L. R. 2 All. 101.

(7) (1902) 4 Bom. L. R. 936.

(8) (1872) 9 B. L. R. App. 19.

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Judge, set aside the convictions and sentences, and direct that the fines, if paid, be refunded.

E. H. M.

Conviction set aside.

REFERENCE UNDER THE STAMP ACT.

Before Sanderson C. J., Mookerjee and Chaudhuri JJ.

1916
June 14.

LINOTYPE AND MACHINERY, LD. AND THE WINDSOR PRESS OF CALCUTTA, *In re*.*

Hire-purchase Agreement—Agreement to hire machinery, whether conveyance or agreement—Stamp duty—Stamp Act (II of 1899), s. 2 (10), Sch. 1, Art. 5, cl. (c).

A hire-purchase agreement, not being an agreement to purchase but simply an agreement to hire the machinery in question with an option on the part of the hirer to purchase, comes within the meaning of Art. 5, cl. (c) of Sch. I to the Stamp Act, and is, therefore, liable to a stamp duty of eight annas.

Helby v. Matthews (1) referred to.

REFERENCE to the High Court under section 57 of the Indian Stamp Act (II of 1899) by the Board of Revenue, Bengal.

On the 28th January 1916, the Collector of Calcutta submitted the hire-purchase agreement, dated 8th June 1914, between Linotype and Machinery, Ld. and the Windsor Press, Calcutta, to the Commissioner of the Presidency Division with a view to obtain a decision of the chief controlling revenue authority as to the correct amount of stamp duty leviable thereon. The document on which no stamp duty had been paid at the time of execution was produced for

* Reference under the Indian Stamp Act (II of 1899).

validation under the Stamp Act on payment of annas 8 which was suggested by the applicants' solicitors, Messrs. Watkins & Co., as properly leviable thereon. The Collector was of opinion that the instrument in question was chargeable as a conveyance under the Indian Stamp Act. The Hon'ble Mr. F. J. Monahan, Member, Board of Revenue, Bengal, concurred that the said agreement came within the definition of conveyance, and on the 18th April 1916 he submitted the following statement of a case to the High Court for decision under section 57 of the Indian Stamp Act (II of 1899) :—

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1. On the 8th June 1914, Linotype and Machinery, Ltd., of London and Calcutta, and the Windsor Press of Calcutta, executed an instrument which is described as a hire-purchase agreement whereby one duplex double-letter linotype machine was hired by the latter for 27 months upon terms and conditions set forth in the document. The principal conditions agreed to are that the hirers shall pay £135 on the execution of the deed and thereafter £540 by 27 equal monthly instalments, together with interest, and that, upon payment of the full sum with the interest in the manner specified in the document, the hired machinery shall become the property of the hirers, but that until such payment is made the machinery shall continue to be on hire.

2. This document was submitted to the Collector of Stamp Revenue Calcutta, by the Solicitors of Linotype and Machinery, Ltd., for the purpose of having it duly stamped. The Collector of Stamp Revenue Calcutta, has raised the question whether a hire-purchase agreement is to be stamped as an agreement or as a conveyance. The applicants proposed to stamp it as an agreement and urged that in England such a document is chargeable as an agreement under section 7 of the Finance Act, 1907. They contend that even if the agreement is taken to be a conditional sale it comes under clause (a) of the exemptions mentioned in Article 5, Schedule I, of the Indian Stamp Act, 1899. They point out that there is no obligation that the machine should be purchased, and state that, in a number of cases, the machine is returned to the owners after it has been hired for a certain period. The Collector points out that the provisions of section 7 of the English Act cannot be followed here, and that it is necessary to consider how such an instrument should be dealt with under the Indian Stamp Act, as there is no special provision for the stamping of a "hire-purchase" instrument in Schedule I thereof. He holds that the

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instrument comes within the term "conveyance" as defined in section 2 (10) of the Indian Stamp Act and is liable to be stamped as such.

3. The Legal Remembrancer, who was consulted, considers that there are good grounds for holding that the instrument under consideration comes within the definition of conveyance and should be stamped in the manner suggested by the Collector. The Board concurs with the opinion of the Legal Remembrancer, but considers that the question how a hire-purchase agreement should be stamped is of such importance as to render it necessary that a reference should be made to the Hon'ble High Court for an authoritative decision under section 57 of the Act.

4. Printed copies of the document in question, of the Collector's letter of the 28th January 1916 and of the Solicitors' letter of the 6th January 1916 are submitted herewith.

The Advocate-General (Sir S. P. Sinha), for Government, in support of the reference. The question is whether a hire-purchase agreement is to be stamped as an agreement or a conveyance. (Reads document and statement of case submitted by the Hon'ble Member of the Board.) But for this reference I would have personally thought that there was no difficulty about this matter. The document does not purport to be other than what it actually is, viz., an agreement to hire the machinery in question with an option on the part of the hirer to purchase. It is not even an agreement to purchase. Considering the clause in the agreement I have great difficulty in arguing that it was a conveyance. It comes within the principle of the House of Lords decision in *Helby v. Matthews* (1): see also *Commissioners of Inland Revenue v. Angus* (2). It is not even an agreement to buy. Even if I could spell out an agreement to buy it would not be a conveyance, while in the House of Lords case it was not even an agreement to buy.

[SANDERSON C. J. See page 477. The criticism of the Master of Rolls is very pertinent.

(1) [1895] A. C. 471.

(2) (1889) L. R. 23 Q. B. D. 579,
 594, 596.

So far as authorities are concerned. I do not wish to trouble your Lordships further, and it puts me out of Court. I cannot support the contention of the Collector that it is a conveyance within the definition of section 2, clause (10) of the Stamp Act.

[MOOKERJEE J. That is the Collector's view of Civil Law.]

I cannot support the view that it is a conveyance.

[CHAUDHURI J. The same view has been taken in *Gopal v. Sorabji*(1).]

The proper stamp is 8 annas under Article 5, clause (c) of the Stamp Act.

Mr. Buckland for Linotype and Machinery, Ltd. (objectors), was not called upon.

SANDERSON C. J. In this case I am of opinion that the document in question is an agreement and not a conveyance.

The document in question has been somewhat loosely described in the reference to us as a hire-purchase agreement. In order to ascertain what the real effect of the document is, we must of course look at the terms of the document; and, I am bound to say that when I heard the document read by the learned Advocate-General, the thought that came to my mind was that the point was not arguable. Therefore I was not at all surprised to hear the learned Advocate-General say, as one would expect him to say under such circumstances, that in his opinion the point was not arguable. Even apart from the decision in *Helby v. Matthews*(2), which has been cited to us, it is obvious upon the face of the document in question that it is an agreement and nothing more than an agreement. Further than that, it is not even an agreement to purchase, but simply an agreement to hire the

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(1) (1904) 6 Bom. L. R. 871.

(2) [1895] A. C. 471, 477.

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machinery in question with an option on the part of the hirer to purchase.

Under these circumstances, in my judgment, the answer which must be given to this reference is that the document in question is an agreement within the meaning of Article 5, clause (c) of Schedule I to the Indian Stamp Act, and is therefore liable to a stamp duty of eight annas.

MOOKERJEE J. I agree.

CHAUDHURI J. I agree.

Solicitors for Government : *Sanderson & Co.*

Solicitors for Linotype and Machinery, Ltd. :
Watkins & Co.

G. S.

ORIGINAL CRIMINAL.

Before Chaudhuri J.

In the matter of CHARU CHANDRA
 MAZUMDAR.*

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 July 29.

Habeas Corpus—Jurisdiction—Arrest—Criminal Procedure Code (Act V of 1898) ss. 54, 190, 491, 498—Procedure—Applications under s. 491, to whom should be made—Arrest under s. 54—"Reasonable suspicion" or "credible information," what to be based upon—Duties of police officer arresting—Practice

Applications under s. 491 of the Code of Criminal Procedure ought to be made to the Judge sitting on the Original Side, and exercising the Ordinary Original Criminal Jurisdiction of the High Court.

In the matter of Rudolf Stallman(1) referred to.

Section 54 of the Code of Criminal Procedure gives very wide powers

* Ordinary Original Criminal Jurisdiction.

(1) (1911) I. L. R. 39 Cal. 164.

and ought to be rigorously construed. "Reasonable suspicion" or "credible information" upon which an arrest can be made by a police officer under section 54, must be based upon definite facts and materials placed before him, which the officer must consider for himself, before he can take any action under that section. He cannot delegate his discretion, or take shelter under another person's belief or judgment, but must act on his own personal responsibility.

Queen v. Behary Singh(1) followed.

THIS was a Rule issued on the petition of one Charu Chandra Mazumdar calling upon the Commissioner of Police to show cause why the said Charu Chandra Mazumdar should not be set at liberty, and why this Court should not pass such other order as to it may deem fit.

Charu Chandra Mazumdar, the petitioner, was a member of the firm of Messrs. C. C. Mazumdar & Sons, who were the Managing Agents in Calcutta of the Bharat Luxmi Provident Co., Ltd. It appeared that the police at Karwar, a place about 200 miles from Bombay, were making enquiries into certain complaints against the Bharat Luxmi Provident Co., Ltd., and a person named D. R. Soman, the Agent of the Company at Karwar. On the 8th May, 1916, a letter was received by the Commissioner of Police, Calcutta, signed by R. V. Kowshik, Police Inspector. C. I. D., Poona, dated the 22nd April, 1916, to the effect that from enquiries made into the complaints against the Bharat Luxmi Provident Co., Ltd., and their Agent Soman, it was found that the Managing Agent, Charu Chandra Mazumdar of Calcutta, had committed offences under sections 409 and 420 of the Indian Penal Code, and that there was *prima facie* evidence to that effect, and the Commissioner of Police, was requested to arrest Charu Chandra Mazumdar and send him to Karwar for trial. That letter was

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countersigned by the District Superintendent of Police, and also by the District Magistrate, who expressed the opinion that the petitioner may be arrested under section 54 of the Code of Criminal Procedure. On receiving that letter, the Calcutta Police arrested the petitioner on the 26th June, 1916. He was kept in custody that day, and on the next day in the afternoon the petitioner moved his Lordship, the Chief Justice, who directed that he should be produced before the Court the next day, the 28th June, at 11 A.M. On the 28th June an application was made on behalf of the petitioner on notice to the Commissioner of Police and the Court (the Chief Justice and Mr. Justice Walmsley), after hearing counsel for the petitioner and the Commissioner of Police, issued the present Rule. When the Rule came on for hearing before the Chief Justice and Mr. Justice Walmsley, a question was raised as to whether such applications ought not to be made to the Judge exercising the Ordinary Original Criminal Jurisdiction of this Court, and the matter was accordingly sent to Mr. Justice Chaudhuri for disposal. At the hearing before Mr. Justice Chaudhuri, counsel for both sides intimated to his Lordship that the practice of this Court had been for such applications to be heard by the Judge on the Original Side of the High Court, and he being the Judge who exercised the Original Criminal Jurisdiction of the Court, they asked him to deal with this question.

Mr. C. R. Das (with him *Mr. R. N. Mitter*), for Charu Chandra Mazumdar. The whole question is whether upon the information contained in the letter received by the Commissioner of Police there could be a valid and proper arrest by the Calcutta Police under section 54. That section gave very large powers, and such powers ought to be exercised with great caution.

I contend that the arrest of the petitioner is in excess of the powers conferred by section 54, and that in any event it is an improper arrest. Section 54 must be rigorously construed. The "reasonable suspicion" or "credible information," whatever it is on which the arrest is sought to be made, must be based on facts. In this case there was no complaint against the petitioner.

The Advocate-General (Sir S. P. Sinha) (with him *The Standing Counsel, Mr. B. C. Mitter*), for the Commissioner of Police. The only point is whether section 54 of the Code of Criminal Procedure gave authority to the officer here, entrusted with arresting the petitioner, to arrest him. It is quite clear that when the officer in question effected the arrest all he had before him was the letter, dated the 22nd April, of the Police officer at Karwar. The question is whether the police were justified on the information contained in the letter in arresting the petitioner without an order from a Magistrate and without a warrant. Although this letter was signed by the Magistrate, it was not a warrant. If this arrest is to be justified, it can only be justified under the first clause of section 54 which stated there must be a reasonable complaint, or credible information, or reasonable suspicion. I do not think the other side will contend that the police here have not acted *bond fide*.

[CHAUDHURI J. It was quite competent to the Magistrate there to issue a warrant and send it to the Commissioner of Police here to execute it within the jurisdiction of this Court.]

Sir S. P. Sinha. Yes.

Although the letter from the Police officer at Karwar is countersigned by the District Superintendent of Police and the District Magistrate, the signatures of these officers could have no force, or effect

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beyond this that they made the information in the letter of the 22nd April more credible, and more worthy to be acted upon than it would otherwise have been. I do not think there is any reported case bearing on the point raised in this application.

Mr. C. R. Das, in reply, referred to the case of *Queen v. Behary Singh* (1), where this point has been discussed.

Mr. A. A. Avelton, for the Bharat Luxmi Provident Co., Ltd.

CHAUDHURI J. This is an application under section 491 of the Criminal Procedure Code for the production of one Charu Chandra Mazumdar who was arrested under section 54 by the Calcutta Police. A Rule was issued by the Chief Justice and Mr. Justice Walmsley constituting the Criminal Bench, but a question having been raised as to what the proper procedure is, in a case of this character, as to whether such applications ought not to be made to the Judge exercising the Ordinary Original Criminal Jurisdiction of this Court, the matter has been sent to me for disposal. For a great number of years all these applications have been made, as a rule, to the Original Side of this Court. With the exception of one case, namely, that of *Rudolf Stallmann* (2), I do not remember any single case in which that practice was departed from. An application was made in that case to a single Judge of this Court, but the Rule was eventually heard by three Judges forming a Special Bench constituted by the Chief Justice. Having regard to the practically uniform procedure of this Court and the rules framed by the Court under section 491(2) of the Code of Criminal Procedure, I hold that the Original Side in its Criminal Jurisdiction is the proper Court to deal

(1) (1867) 7 W. R. Cr. 3.

(2) (1911) I. L. R. 39 Cal. 164.

with these applications. I find that the same is the procedure in Bombay, such applications being made on its Crown side. I apprehend the application was made in *Stallmann's Case* (1) following the practice obtaining in England, where such an application may be made to any Judge of the Supreme Court, but such a procedure, so far as I know, has no sanction so far as we are concerned. I have made the above observations, as I have been asked by both sides to deal with the question of procedure in my judgment in this matter. It is to be noticed that an order made by me in the exercise of my Original Criminal Jurisdiction is appealable under our rules, whereas an order made by the Criminal Bench is not appealable.

Now, coming to the matter of the application, section 54 of the Code of Criminal Procedure authorises arrest without an order from a Magistrate, and without a warrant only in certain circumstances, limited by the provisions therein contained. I need not deal with any other proviso except the first. In this case there was no complaint before the Police officer who arrested the applicant, and the question is as to whether he had received "credible information," or whether it can be said that "reasonable suspicion" existed that the applicant was concerned in a cognizable offence. There was no information before the officer, except the following letter:—

"No. 267 of 1916.

To

THE COMMISSIONER OF POLICE,
Calcutta.

Karwar, 22nd April 1916.

Sir,

Re Enquiry into the affairs of the Bharat Laxmi Provident Company of Calcutta.

I respectfully beg to state that on enquiry made into the complaints against the above-named Bharat Laxmi Provident, Co., Ltd.,

(1) (1911) I. L. R. 39 Calc. 164.

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81, Clive Street, Calcutta, and their Agent, D. R. Soman of Khanapur. Bombay Presidency, it is found out that the Managing Agent, Charu Chandra Mazumdar of Calcutta, and Agent, D. R. Soman of Bombay, have committed offences under sections 409—420 of the Indian Penal Code, as there is *prima facie* evidence to that effect. I therefore request that you will kindly arrange to have the said Charu Chandra Mazumdar, the Managing Agent of the Company, 81, Clive Street, Calcutta, arrested and sent to the District Magistrate, Kanara, Karwar, for trial.

I beg to remain,

Sir,

Your most obedient servant,

(Sd.) R. V. KOWSHIK,
Police Inspector, C. I. D., Poona,
on special duty in Kanara district,
Bombay Presidency.

Respectfully forwarded through the District Superintendent of Police and the District Magistrate, Kanara.

I. 3242
 No. 7-5-16

No. 1391 of 1916.
Karwar, 29th April, 1916.
 23-4-16.

FORWARDED with compliments.

(Sd.) DANIEL DONALD,
D. S. Police Kanara.

I. R. 1367
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No. 3416, of 1913.
Karwar 3rd May, 1916.

FORWARDED with compliments.

The person in question may be caused to be arrested under section 54 of the Code of Criminal Procedure, and forwarded to the Magistrate, 1st class, Karwar, by whom the case will be heard.

[Signature illegible,]
District Magistrate Kanara.

Below No. 3416, dated 3rd May 1916, from District Magistrate, Kanara

No. 1466, of 1916.
Karwar, 4th May, 1916.

FORWARDED with compliments to the Commissioner of Police, Calcutta, for whom this is intended.

(Sd.) DANIEL DONALD,
District Superintendent of Police Kanara."

The letter, it will be noticed, contains no particulars. The note made by the Magistrate is merely a recommendation, which may be neglected. It is not suggested by the Crown that it may be read as warrant or that it should be considered as of any value. If the Magistrate had materials before him, he was the proper officer to issue a warrant; but if he did not feel competent to exercise his power, his recommendation is worth nothing.

A statement of an indefinite character is all that was before the Police officer who acted upon the letter, and apparently he did so being frequently applied to by the police officer at Kanara. It seems clear to me that the information upon which a police officer may act under this section must be such as enables him to conclude that it is credible; there must be facts before him to base his judgment upon. I do not think it can be said that a police officer has credible information, merely because a brother police officer in some remote part of the country writes a letter that he has information upon which he thinks that there is "*prima facie* evidence," and that action ought to be taken under this section. The discretion which is given to the officer who has to arrest must mean discretion exercised by him upon consideration of the materials placed before him, not merely an intimation that some other police officer thinks that some offence or other, has been committed. What the precise nature of the offence is, the letter does not state. A police officer acting under this section has to act on his personal responsibility. If he could act on a representation made to him, as in this case by a brother police officer that he had some information, the responsibility could be shifted from person to person, and the provisions of section 220 of the Penal Code entirely nullified. Section 54 gives him personal authority,

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and must involve personal responsibility. He has to be satisfied that he has credible information, and has to show it.

I have next to consider the proviso about "reasonable suspicion." It may be argued that a police officer is justified in thinking that "reasonable suspicion" exists, when he is informed by a brother police officer holding a responsible position that the latter has information upon which he thinks a cognizable offence has been committed. I do not think the section can mean such suspicion. If it be so construed, it may be carried to this extent, that any officer may write to any other officer, that he suspects a man of having committed a cognizable offence and cause his arrest. The section gives wide powers, and ought to be rigorously construed. It is not mere suspicion, but the suspicion must be "reasonable"—reasonable according to the opinion and in the judgment of the officer called upon to arrest. I do not think the argument can be accepted that suspicion entertained by another officer, however responsible the office he may hold, is sufficient for the arresting officer to act upon, or that it is reasonable for him to entertain a suspicion because someone else suspects, as thereby he practically consigns his reason to another person and gets rid of his personal responsibility. I think that "reasonable suspicion" means reasonable suspicion based upon facts which have been brought to the knowledge or cognizance of the officer called upon to arrest—not suspicion which may be aroused in his mind by a communication from a brother officer without particulars. I am strengthened in my opinion by the case of *Queen v. Behary Singh* (1) where Markby J. says: "The widest power is that conferred by para. 2 of section 100" (the

(1) (1867) 7 W. R. Cr. 3.

then corresponding section), "which provides that a police officer may arrest without orders from a Magistrate, and without warrant any person against whom a *reasonable* complaint has been made or a *reasonable* suspicion exists of his having been concerned in any offence specified in the schedule to the Act as offences for which police officers may arrest without a warrant", in other words "cognizable offences" in the words of the present Code. "What is reasonable complaint or suspicion must depend on the circumstances of each particular case; but it must be at least founded on some definite facts tending to throw suspicion on the person arrested, and not on mere vague surmise or information." This case has been cited in later cases both here and in Bombay, and been tacitly followed. The Deputy Commissioner of Police, in his affidavit in answer to the application, says that he had no information except what was contained in the letter above quoted. He had no personal knowledge of the facts, but he thought that upon that letter it was a fit and proper case in which he could exercise the powers conferred upon him by section 54. He does not tell us whether he acted because he thought there was reasonable suspicion entertained by him, or whether he thought he had credible information. A Magistrate's power to take cognizance of an offence under section 190 (1) (c) of the Code of Criminal Procedure is guarded by the words "upon his own knowledge or suspicion," and I do not think that larger powers were intended to be given to a police officer. It is necessary in exercising such large powers to be cautious and circumspect, and I hold that "reasonable suspicion" and "credible information" in section 54 must be based upon definite facts which the Police officer must consider for himself before he acts under

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the section. He cannot delegate his discretion, or take shelter under another person's belief or judgment. Any other interpretation would tend to diminish the sense of responsibility of the officers concerned, and make the exercise of the power, dangerous—possibilities which ought to be guarded against. The Crown has placed this matter before me in the fairest manner possible, and has not desired that my decision should be based upon further materials which have been placed before the police officer since the arrest was effected. The applicant has also placed before me certain facts he has since ascertained, but under the circumstances I am not called upon to consider them, or discuss their relevancy. I make the Rule absolute and direct that the accused be set at liberty.

A. K. R.

Rule absolute.

Attorney for the petitioner and for the Bharat Luxmi Provident Co., Ltd.: *Suresh Chandra Mookerjee.*

Attorney for the Commissioner of Police: *J. T. Hume* (Public Prosecutor).

PRIVY COUNCIL.

JOSEPH

v.

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P.C.^s
1916June 26 ;
July 17.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Compensation—Fixtures, removal of—Calcutta Municipal Act (Beng. III of 1899) ss. 341, 617—Fixtures erected on buildings before 1st June 1863—Assessment of compensation not a condition precedent to demolition of fixtures—Small Cause Court as special Tribunal for determination of compensation—Amount of claim exceeding ordinary jurisdiction of Small Cause Court—Suit not cognisable by Subordinate Judge—Decree correct in substance but not in form—Costs.

In s. 341 of the Calcutta Municipal Act (Beng. III of 1899) which in respect to fixtures erected on buildings “before 1st June 1863,” enacts that “the Corporation shall make reasonable compensation to every person who suffers damage by the removal or alteration of the fixtures,” there is nothing that renders the assessment of compensation a condition precedent to the demolition of the fixtures. Until the removal is effected no damage at all is in fact suffered.

Section 617, “where . . . any municipal authority . . . is required by . . . this Act to pay . . . compensation, the amount to be so paid, and if necessary the apportionment of the same shall in case of dispute be determined . . . by the Court of Small Causes,” includes a claim for compensation by a person against the Corporation for removal of fixtures, although the amount exceeds the ordinary jurisdiction of the Small Cause Court.

In a suit in the Court of a Subordinate Judge by the appellants against the Corporation for compensation for removal of fixtures, they prayed for (a) a declaration that the fixtures in dispute had been erected before 1st June 1863 ; (b) that they were entitled to compensation for the loss they would suffer by their compulsory removal ; (c) that the Corporation could not remove the fixtures until reasonable compensation

^s*Present* : THE LORD CHANCELLOR (LORD BUCKMASTER), LORD ATKINSON
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had been paid; (d) asked the Court to fix the amount of compensation; and (e) for an injunction restraining the Corporation from interfering with the fixtures until compensation was paid. The Subordinate Judge decreed the suit giving compensation. It was dismissed, as being premature (under section 341) and not cognisable by the Subordinate Judge (under section 617), by the High Court where the Corporation, though they had denied the fact in their written statement, admitted that the fixtures had all been erected before 1st June 1863 :—

Held by the Judicial Committee, that the decree of the High Court though correct in substance was incorrect in form and their Lordships amended it by adding to it declarations that the appellants were entitled to relief in terms of (a) and (b) of the prayer of their plaint, the rest of the suit remaining dismissed.

APPEAL No. 115 of 1915 from a judgment and decree (11th June 1913) of the High Court at Calcutta which reversed a judgment and decree (19th May 1910) of the Court of the Subordinate Judge of the 24-Parganas.

The plaintiffs were the appellants to His Majesty in Council.

The facts of the case are sufficiently stated in the judgment of their Lordships of the Judicial Committee.

The judgment of the High Court (CHITTY AND TEUNON JJ.) which was appealed from was as follows :—

“In this case the plaintiffs are the owners of premises Nos. 1, 7, 7-1 and 7-1-1, Circular Garden Reach Road, and No. 92-1 Diamond Harbour Road. As such on 21st August 1908 they were served with a notice under section 341 of the Calcutta Municipal Act (Bengal Act III of 1899) to remove certain fixtures at their premises in Circular Garden Reach Road. The plaintiffs refused to remove such fixtures unless and until compensation was paid for them under clause (3) of the said section. On 5th November 1908, proceedings were instituted against the plaintiffs, under section 450 of the Act, in the Court of the Municipal Magistrate who, on 27th May 1909, passed an order under section 450 for the demolition of the fixtures by the Chairman of the Corporation at the plaintiff's expense. The plaintiffs moved this Court in its revisional jurisdiction and obtained a rule, but that rule was discharged on 22nd July 1909. With regard to the premises in Diamond Harbour Road, notice was served

by the Corporation under section 341 in July 1905, and an order under section 450 obtained from the Municipal Magistrate on 22nd December 1906. The plaintiffs refused to comply with that order.

"Eventually, after having called upon the Chairman to pay them compensation in respect of the fixtures on both properties, they filed the present suit on 20th August 1908. They claimed (a) a declaration that all the fixtures were erected before 1st June 1863; (b) a declaration that they were entitled to be paid reasonable compensation for all loss they would suffer by the compulsory removal of the fixtures; (c) a declaration that the Corporation were not entitled to enforce the removal of the fixtures unless and until such reasonable compensation was paid; (d) a declaration that Rs. 1,89,000 was reasonable compensation; and (e) an injunction to restrain the Corporation from removing the fixtures until the compensation was paid.

"The Subordinate Judge has granted the plaintiffs the relief sought, assessing the damages at Rs. 96,000. He made the payment of Rs. 56,000, part of that sum, conditional, and further ordered a reference to arbitration how the drains were to be covered and the plaintiffs' premises made more accessible from the road. The defendant Corporation have appealed.

"The plaintiffs have filed cross-objection.

"It has now been conceded by counsel for the appellants that the fixtures in question were erected before 1st June 1863. This point, which was put in issue in the lower Court, is, therefore, no longer in dispute.

"It appears to us, however, absolutely clear that the plaintiffs have no present cause of action. The third issue raised was whether the payment of compensation is a condition precedent to the demolition of the fixtures, encroachments and structures, referred to in section 341 of the said Act. The Subordinate Judge has held that it is. In this he has misconstrued the terms of section 341, which enacts that "the Corporation shall make reasonable compensation to every person who suffers damage by the removal or alteration of the fixture." The damage must obviously be caused before the person suffering it can claim to be compensated. The meaning of the words is so plain that no authority is required to assist us in construing them. The same view, however, was taken by a bench of this Court in Second Appeal 1670 of 1910, where the learned Chief Justice said. 'The words themselves appear to be capable of but one meaning, and that is that compensation is only to be paid to a person who has suffered damage by the removal or alteration, so that there must be removal resulting in damage before compensation is payable.' The case cited by the Subordinate Judge, the decision of another bench of this Court in Second Appeal 418 of 1905, is not in point. A declaration was there given in the words of the section,

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but it was not held that the payment of compensation was a condition precedent to the removal or alteration. This is sufficient to dispose of the plaintiffs' suit, which must be dismissed. We ought, however, to add that in our opinion the decision of the Subordinate Judge is erroneous on many other points. For instance, he has misread sections 616 to 619. He had no power whatever to assess the damages at all. Moreover, in assessing them he has proceeded on an entirely wrong basis, the amount arrived at being altogether excessive. He appears to have regarded the soil below the fixtures in question as belonging to the plaintiffs, whereas it was vested in the Corporation. He has also in effect granted an injunction restraining the execution of an order of the Criminal Court which as Judge of a Civil Court he had no power to do.

"The appeal is allowed and the plaintiffs' suit dismissed with costs in both the Courts. The cross-objections are dismissed without costs."

ON this appeal,

DeGruyther, K.C., and *Sir William Garth*, for the appellants, contended that the suit was not premature as held by the High Court, but was maintainable. Under section 341 of the Calcutta Municipal Act, it was not necessary for the fixtures to be demolished before the compensation could be determined. The words of the section are compensation to every person who "suffers" not who "will suffer." The Subordinate Judge was right in holding that payment of the compensation was a condition precedent to the demolition of the fixtures. Compensation has been held to be payable in many cases in England under the Lands Clauses Act, 1845, before land is taken, or buildings or other erections are removed. The erection of the fixtures is now conceded to have been before 1st June 1863, and the appellants were entitled to a declaration to that effect. As for section 617 of the Act, the question of the amount of compensation was only to be tried by the Small Cause Court if the amount was within its jurisdiction. Here the amount was above the jurisdiction of the Small Cause Court, and the case was properly triable by the Subordinate

Judge. The effect of sections 617, 618 and 619 was that section 617 applied only to claims by the municipality, and not to cases where a person was claiming against the municipality. The appellants were also entitled to a declaration that they were entitled to be paid a reasonable compensation for loss they would suffer by the removal of the fixtures.

A. M. Dunno, for the respondents (who was asked to confine himself to headings (a) and (b) of the relief asked for in the plaint)* said that the Corporation had stated they were willing to pay reasonable compensation, but what the appellants asked for was excessive and calculated on an erroneous principle. There must be satisfactory proof given before the Corporation could be made liable in a suit for damages or for compensation for damages which had never occurred.

DeGruyther, K.C., replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. In this case the appellants are the owners of a bazaar in Kidderpur, which abuts upon two public streets known as Garden Reach Road and Diamond Harbour Road respectively. Along the frontages of these streets there are a number of verandahs or shops connected with the main buildings and erected upon culverts or platforms placed over drains which run by the side of the roads. The streets and drains are vested in the respondents as the Corporation of Calcutta, and they, on the 13th July, 1905, and the 21st April, 1908, served notices (under section 341 of The Calcutta Municipal Act of 1899) upon the appellants, requiring the removal of these fixtures in Diamond Harbour Road and Garden Reach

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* See Judgment of High Court, page 89.

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Road respectively. The provisions of section 341, so far as it affects service of the notices, is not material, but it contains, in subsection (3), certain provisions material to this dispute, which are in these terms :—

“If the owner or occupier of the building proves that any such fixture was erected before the first day of June, one thousand eight hundred and sixty-three, or that it was erected on or after that day with the consent of any municipal authority duly empowered in that behalf, the Corporation shall make reasonable compensation to every person who suffers damage by the removal or alteration of the fixture.”

The appellants paid no attention to the notices, and respondents accordingly made application to the Magistrate for demolition of the structures as to Diamond Harbour Road, on the 22nd November, 1905, and as to Garden Reach Road, on the 5th November, 1908. Orders were made on both these summonses—the first on the 22nd December, 1906, and on the second on the 27th May, 1909.

A rule *nisi* was obtained by the appellants to discharge the order relating to Garden Reach Road, but this rule was set aside on the 22nd July, 1909.

On the 6th August, 1907, the respondents, in answer to an application of the appellants, offered 178 rupees as compensation for certain of the erections in Diamond Harbour Road; on the 6th August, 1909, a similar application was made in respect of Garden Reach Road, and no reply having been received by the 20th August, 1909, these proceedings were instituted. At this time no steps whatever had been taken by the respondents to enforce the order for demolition, nor, excepting in respect of the one set of premises in Diamond Harbour Road, had they made any offer for compensation if demolition took place. In fact, as appeared in the proceedings, the Corporation denied the right of the appellants to be compensated, upon the ground that, with a certain exception, the buildings in question had not been erected before the 1st

June, 1863. The relief sought in the suit was ranged under five heads.

The first asked for a declaration that the structures in dispute had been affixed before the 1st June, 1863. The second, that the plaintiffs were entitled to compensation for the loss that they would suffer by their compulsory removal. The third, that the Corporation could not remove the structures until reasonable compensation had been paid. The fourth asked the Court to fix the amount of compensation. The fifth asked for an injunction restraining the Corporation from interfering with the structures until the compensation was paid.

The Corporation specifically denied the allegation that the structures in Garden Reach Road had been erected before the 1st June, 1863; but as to Diamond Harbour Road they gave a more qualified denial, and admitted that part of them had been erected before that date. They disputed that the payment of compensation was a condition precedent to the removal of the fixtures, and they alleged that under section 617 of the Calcutta Municipal Act the claim with regard to Diamond Harbour Road was bad in law, and that the suit could not be entertained by the Court.

The Subordinate Judge found in favour of the plaintiffs upon all the issues, and allowed compensation to the plaintiffs to the extent of 1,22,000 rupees. From his decree the respondents appealed to the High Court, and on the hearing of the appeal for the first time they admitted that all the fixtures in dispute had been erected before the 1st June, 1863; this admission having been made, the High Court reversed the decree of the Subordinate Judge, and dismissed the action with costs. From this judgment of the High Court the present appeal has been brought, seeking to restore in all particulars the decree of the Subordinate Judge.

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The two questions of law that arise for consideration can be briefly disposed of.

The *first* relates to the true construction of section 341. Their Lordships cannot find anything in this section which renders the assessment of compensation a condition precedent to the demolition of the structures. The words of the section, which have already been quoted only provide for compensation to the person "who suffers damage" by the removal. Until the removal is effected no damage is in fact suffered at all, and there is but little advantage to be gained in considering, as counsel for the appellants desired their Lordships to do, the questions of compensation under the Lands Clauses Act of 1845, or the consideration of whether, in certain circumstances, assessment of compensation ought to be a necessary condition precedent to interference with property. It is sufficient that, in their Lordships' opinion, the words of the statute, construed as they stand, do not furnish any ground upon which to support the appellants' claim.

The next point is whether, under section 617, the fixing of compensation in case of dispute is not placed in the Court of Small Causes, so that the question was not cognisable by the Court in which the present suit was instituted. Their Lordships think that, in this respect also, the judgment of the High Court was clearly correct. Omitting irrelevant and unnecessary words for the present purpose, section 617 provides this:—

"Where . . . any municipal authority . . . is required by . . . this Act to pay . . . compensation, the amount to be so paid, and, if necessary, the apportionment of the same, shall, in case of dispute, be determined . . . by the Court of Small Causes."

Their Lordships find it quite impossible to understand how these words can be read so as to exclude

the present dispute from their meaning; and, indeed, counsel for the appellants did not contend that section 617 read alone would bear that interpretation, but they suggested that the effect of sections 618 and 619 would be to show that section 617 was not intended to apply to claims by a person against the municipality, but only by the municipality against other parties. Now sections 618 and 619 refer to the means to be taken in order to obtain payment and recovery of expenses or compensation awarded in 617. And in both of these sections reference is made to the claim being a claim enforceable only against a person, the words "municipal authority" being omitted. The respondents say that in these sections, by virtue of certain interpretation clauses, the word "person" includes "municipal authority." It may be so, but in their Lordships' opinion it is quite unnecessary to decide the question. Even assuming the appellants' view of sections 618 and 619 to be correct, it amounts to nothing more than this—that a special means of recovery of the amount awarded is given to the municipality which is not given to the individual, but from this it does not follow that the amount of compensation payable by the municipality to the individual, when in dispute, should not be fixed and determined under the earlier section. So far, therefore, as the suit sought relief under any but the first two heads, it was misconceived, and the whole of the expenses thereby occasioned were thrown away.

Their Lordships think, however, that, in the circumstances of the case, the appellants were entitled to ask for relief under the first two heads of their claim. When the proceedings were started, the Corporation was not prepared to admit the claim to compensation excepting in respect of a small portion of the premises in Diamond Harbour Road. Orders

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were outstanding for demolition. These orders might have been enforced at any moment, and, as the matter stood, they would have been enforced by the Corporation under an assertion that, except for a small amount, no compensation would be payable in respect of the damage done. This seriously affected the appellants' right of property in these structures, and they were entitled to ask for a declaration in respect of this right under the Specific Relief Act (section 42). It does not, of course, follow that the Judge would be bound to give the declaration sought, but their Lordships think that the discretion of the Subordinate Judge would have been rightly exercised in granting such a declaration or in making an equivalent order. When, however, the matter proceeded to the Court of Appeal, the whole of this dispute was abandoned. There was no longer any controversy as to the date when the buildings were erected, and the Corporation made a plain admission that they were all built before the 1st June, 1863. If the High Court had incorporated this admission into the actual form of their decree, instead of referring to it in the reasons which they gave, their judgment would have been correct in form, as it was, in their Lordships' opinion, correct in substance, and the appellants would have had no ground for complaint. This, however, they omitted to do, and though the matter is in one sense a matter of technicality, yet, upon the whole, their Lordships think that the appellants are right in saying that the decree ought to be amended in this particular.

The Corporation have really raised no objection to this step being taken, but complain that this was not the substance of this appeal and did not form the real substance of the original suit. This matter their Lordships have taken into consideration in dealing with the costs of the proceedings; and the order which

they will humbly advise His Majesty to make will be that the decree of the High Court be amended by introducing an admission on the part of the Corporation that all the structures affected were erected before the 1st June, 1863, and that the appellants are entitled to be paid reasonable compensation by the Corporation for the loss which the appellants would suffer, if and when, such structures are compulsorily removed by the Corporation, and that so amended it be confirmed.

The Corporation will pay the appellants' costs of the action upon the footing that the only relief this action asked was that contained in clauses (A) and (B) of the prayer in the plaint.

The appellants will be ordered to pay the respondents' costs of all the other issues in the suit. Those costs will be set-off *pro tanto* one against the other. The order of the Court of Appeal as to costs will remain and no costs will be allowed of this appeal.

Appeal partly allowed.

SOLICITORS for the appellants : *Watkins & Hunter.*

SOLICITORS for the respondent : *Orr, Dignam & Co.*

J. V. W.

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APPELLATE CIVIL.

Before N. R. Chatterjee and Richardson JJ.

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April 7.

Jute—Fariahs—Trade-usage at Chandpur—Passing of property on sale—Custody with purchaser merely as security for advances—Insurance of that interest, benefit of—Contract Act (IX of 1872) s. 81.

When nothing remains to be done to the goods by the seller for the purpose of ascertaining the price, then *prima facie* the property in them passes although they have not been weighed by the buyer.

Simmons v. Scift (1), *Turley v. Bates* (2), *Shoshi Mohun Pal Chowdhry v. Nabo Krishto Poddar* (3), *Martineau v. Kitching* (4) referred to.

It would be otherwise in England if the parties intended that property in the goods should not pass until the goods had been weighed.

The Indian Law is the same and the provisions of section 81 of the Contract Act do not exclude the question of intention which is laid down in the English cases as the determining factor.

Where according to the usage of trade at Chandpur the sale of jute by *fariahs* is not complete until the goods are examined, selected and weighed by the company (purchaser) although stored in the godowns of the company by whom advances have been made to the *fariahs* against these goods :—

Held, that the contract in the present case being in the first instance a contract for the sale of unascertained goods, what remained to be done by the buyer to the goods appropriated to the contract by the seller was not merely for the purpose of ascertaining the price but was also for the purpose of placing the buyers in a position to say whether and to what extent they would for their part accept the goods offered to them.

That the position seemed to be that the buyer had a right to the custody of the jute as security for his advances, and that in addition while the

* Appeal from Original Decree, No. 160 of 1912, against the decree of Satkowri Haldar, Subordinate Judge of Tippera, dated Feb. 19, 1912.

(1) (1826) 5 B. & C. 857.

(3) (1878) L. L. R. 4 Calc. 801.

(2) (1863) 2 H. & C. 203, 208.

(4) (1872) L. R. 7 Q. B. 436, 449.

seller had no right to sell to others, the buyer was under a corresponding obligation to buy as much of the jute as was of the requisite standard.

That (though the company had insured this jute as their own) the insurance appeared to have been intended for the protection of their own interest in the jute, not for the protection of the seller's interest which they were not bound to insure.

That the defendants, therefore, were entitled to apply the whole amount which they received under the policies of insurance to indemnify themselves against the loss which they themselves had actually sustained and were not bound to apply any portion of it to the benefit of the plaintiff.

That there was no usage that the loss is borne entirely by the company in cases where the jute is not insured to the full extent.

APPEAL by the plaintiffs, Abdul Aziz Bepari and another.

The plaintiffs' case was that they entered into a contract for the supply of jute to the defendants Jogendra Krishna Roy and Sarat Chandra Shome who were partners, the terms of the alleged contract with the defendants being as follows :—“(i) That the plaintiffs would purchase jute for the defendants during the jute season of 1909 and that the latter would pay the price according to the market rate after ascertaining the quantity by weighment. (ii) That for the purpose of purchase the defendants would advance money from time to time and then after the close of the *kar-bar* they would further pay the balance of the price of the jute taken by them after deducting the amount of the advances. (iii) That after their purchase the plaintiffs would store the goods so purchased in the defendant's godowns and keep them under the care of the defendants. (iv) That the plaintiffs would report to the defendants the quantity of the goods stored on the very day the goods were stored. (v) That, except their right to the price of the goods stored, the plaintiffs would cease to have any right of ownership therein. The ownership would pass to the defendants as soon as the goods were stored in the godowns.” The terms

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of the contract were also alleged to be in consonance with the practice and usage of the jute trade obtaining at Chandpur where the business took place. On the 25th September 1909, the godowns containing the jute were burnt, after they had been insured by the defendants who had subsequently got the value of the burnt goods from the Insurance Company. The plaintiffs alleged that the total value of the jute supplied to the defendants amounted to Rs. 84,747-7 including that of the jute burnt. The amount of advances taken by the plaintiffs being Rs. 68,408-5-6, they sued for the balance Rs. 16,339-1-6 together with interest thereon amounting to Rs. 2,246-6-6 or Rs. 18,585-8 in all. The defendants did not admit the contract nor the trade usage as set up by the plaintiffs, nor the amount of their claim and urged that the ownership of the goods did not pass to the defendants until they were weighed after selection. The defendants further alleged that they did not insure the goods stored in the plaintiff's godowns, but that they insured their (*i.e.*, defendants') interest in the advances taken from them by the *fariahs* to the amount of Rs. 30,000, and not to the extent of Rs. 70,000 as said by the plaintiffs. The defendants did not also admit the market rates nor the quantities alleged by plaintiffs to have been sold to them; and averred that the plaintiffs had taken advances to the amount of Rs. 68,408-9-6 but had sold jute to them only to the value of Rs. 42,441-1-3, and that the plaintiffs thus still owed them Rs. 25,967-4. On 19th February 1912, the learned Subordinate Judge of Tippera dismissed plaintiff's suit. Thereupon they preferred an appeal to the High Court.

Mr. Caspersz (with him *Sir Rashbehary Ghose*,
Babu Gopal Chandra Das, *Babu Bipin Chandra Bose*

and *Babu Jotindra Mohan Ghose*), for the appellants. Plaintiffs are *fariahs* at Chandpur, *i.e.*, people who after collecting jute from the cultivators lodge it with the defendants, J. K. Roy and others, who make very considerable advances to us. The defendants stored jute in their own godown and insured it. In June a fire broke out there. Under the Contract Act the property in the jute had passed to the defendants being ascertained and appropriated, only subject to rejection if not found up to sample. On the day before the fire they tried to reinsure this jute, but refused to give us any information whether in this application it was insured as their own property or not: and their case becomes more desperate now, in that "jute belonging to J. K. Roy and Co., was stored in my godown." (Refers to sections 78, 81 and 86 of the Contract Act). The price had been finally settled and everything had been done by the seller: therefore the sale was complete, and more than two-thirds of the price has been already paid to us. Section 86 of the Contract Act says that when goods have become the property of the buyer they must bear any loss arising from its destruction: *Shoshi Mohun Pal Chowdhry v. Nabo Krishto Poddar* (1), and the present is a much stronger case. The only question is whether, regarded as a contract of out and out sale or of bailment, the other party is to use due diligence; and he has done so by effecting three insurances. But now J. K. Roy & Co. are trying to say that they were not insuring the goods but only their interest in the goods, in spite of their admission in their application to the Insurance Co. that the jute belonged to them. It is a powerful combination between agents of Insurance Cos., and powerful *aratdars* at Chandpur to get as much as they can, and

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give as little as possible to the *fariahs*. There has never been any written contract in the trade.

[N. R. CHATTERJEA J. Is it not then necessary to go into evidence of usage or custom at Chandpur?]

Yes. On the admitted facts of the case the proprietary right had passed from us. Most of the evidence consists of the opinion of these very jute firms and therefore is no evidence at all. There was also unweighed jute. If these *aratdars* are to be allowed to recover the insurance money, because this jute was not weighed, can they say it is not their property though they have advanced large sums of money for its payment? See *Martineau v. Kilching* (1), where it was held that the purchaser cannot delay passing of property on delivery. 3,000 odd maunds were burnt. But if this amount be disallowed plaintiffs would be indebted to defendants for refund of advances. Even in case of bailment the bailee must take as much care of these goods as if his own. Even if the goods were with him merely as bailee, he attempted to insure them, and the loss is his if he failed. If defendant had insured the whole of the jute there would have been no loss. Messrs Jardine, Skinner & Co. won't pay the defendant *aratdar* unless they get the jute; defendant does not therefore want to pay us, the *fariahs*, and in consequence the poor raiyats who trusted us, the *fariahs*, with their jute will alone suffer. The present case does not come under sections 84 and 85. Applying common sense test, intention is the thing. They could not reject arbitrarily and must take the whole lot, and the onus is on the defendants to show that they were not up to sample. We got an advance of Rs. 60,000 for these very goods from the defendants. This is a very important test—*vide* section 78 of the Contract Act,—

(1) (1872) L. R. 7 Q. B. 436, 449.

acceptance of price and part payment. Here we have both tests, payment of purchase money and delivery of goods. I was defendant's agent up to a certain point. On his behalf I go to the mofussil with his advances and purchase jute and make payments. Wet jute had to be dried before it could be weighed. Mr. Mackertich says each firm has its own system, and there is no local custom common to all. There has been a part performance of such a character that the contract does not rest in obscurity any longer. It is quite sufficient for my purpose that I have given them every opportunity to produce those policies, but they gave evasive answers and took shelter under business etiquette. In suit No. 68 (the 3rd suit, *i.e.*, the one against me) the contentions arise merely by way of answer to the second case. This 22,000 rupees worth of jute was in another godown. Yet they won't give us credit of rupees 31,000 for the burnt jute that was insured. The defendants have consistently withheld production of all papers that went against them. The most cogent fact in the case is the representation defendants made to the Insurance Co., that they did insure jute belonging to them in their godown. We were ignorant people in their hands. Defendants kept on taking delivery after making advances, selecting and weighing, etc., in their godowns. *Beparis* generally sell to *fariahs* who sell to the big companies. It is the duty of the Insurance Co.'s agent to ascertain the quantity of jute insured and yet he says, he does not know.

No contract can override the provisions of the Contract Act unless it is very precise and the parties fully understood it. The Insurance Co. took the burnt jute because of the representation by the defendants that the jute belonged to them. The original application for insurance would show how much jute was insured

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on each occasion. But they have not been produced. The price of the goods saved from fire has not been paid to us. The market rate was to be that on date of delivery, for otherwise they could delay weighment by a fortnight or more. When the goods go out of my possession I have no right to get them back. The tally book kept by the *fariah* is simply a system of check. There is very little variation between the parties as to the facts, but only as to the inference to be drawn from those facts.

[*Babu Jogesh Chandra Roy*, for the respondent. The plaintiffs say that the goods were not weighed and no price settled, and they are not entered as *bikri* or sold.]

But no jute was ever rejected. I submit that the insurance of the actual goods and not defendant's interest in their advances was made. There is no such thing as an insurance of advances recognized.

Babu Jogesh Chandra Roy (with him *Babu Akshoy Kumar Banerjee*), for the respondents. Without going into the law, on the facts it is clear that the ownership in the goods did not pass to my client. Taking the evidence one by one it will be found that the Subordinate Judge's decision is quite right. I have a lien on the goods to the extent of my advance and would not allow them, therefore, to remove the goods. But this does not show that property had passed to me. The import or *fariah's* godown is also our godown. From there after weighment the jute is removed to our godown. All the plaintiff's witnesses including Mr. Mackertich, who is disinterested, put plaintiffs out of Court. There is no reliable evidence of any contract. We have advanced them Rs. 68,000 in two cases and Rs. 36,000 in the other. The jute burnt is worth Rs. 77,000 and we have got from the Insurance Co. only Rs. 30,000 and so we are not making

anything out of this insurance, but have lost Rs. 38,000. See *Boswell v. Kilborn* (1), *Swanwick v. Sothorn* (2), and Halsbury's Laws of England, Vol. 25, Arts. 299, 300 and 301, p. 167.

Sir Rashbehary Ghose, in reply. The question in controversy lies in a nutshell, viz., had the property in the goods passed to the defendants before destruction? I rely on the undisputed facts of the case. It is established beyond controversy that the defendants had to pay for goods of proper quality, and my clients could not have sold this jute to a third party, although defendants have the right to reject inferior goods.

[RICHARDSON J. The whole thing depends on the course of local usage.]

The defendants don't rely on any local or trade usage. Mr. Mackertich says "after weighment of goods it is taken that goods pass to purchaser." This is a mere matter of opinion on a pure question of law. Under the Contract Act if nothing remains to be done by seller the goods pass to purchaser. Here the price could be ascertained.

[N. R. CHATTERJEA J. There is no evidence to show that the goods had to be weighed in the presence of both parties.]

From the very nature of this case there could not be any *ex parte* weighment, for nobody would be bound by an *ex parte* weighment. The weighment was really one to be made by the purchaser for his own satisfaction when in his import godown. The defendants have the right to see that goods are of the right quality and to check my weighment by weighing again, though title had already passed: *Turley v. Bates* (3). Baron Channells' remarks are at

(1) (1862) 15 Moo. P. C. 309.

(2) (1839) 9 Ad. & E. 895.

(3) (1863) 2 H. & C. 200, 208.

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page 208. Lord Blackburn criticises this rule, similar to French and Roman law. The defendants might put off weighing for months and months. Surely it can't be said that property had not passed although the seller had done everything he was bound to do. What then could be the position of the *fariah*? He could not sell these goods to any other person, and would by defendants' delay be put off from dealing with the goods; and we know that the jute was to be sold at the market rate for that day. The fact that I could not sell these goods to any other is conclusive that the defendants were the owner: *Martineau v. Kitching* (1). This was a case of weighing. Here you can't say that the price remained to be ascertained owing to the well known legal maxim that all that was capable of being ascertained must be taken to be ascertained. Illustration (a) to section 81 of the Contract Act is taken from *Turley v. Bates* (2). What is there in principle, in common sense and practical convenience to prevent the price being ascertained on subsequent measuring (by consent of parties). It was not the duty of the buyer to be present at weighment though he had a right to be present. The mere fact that the buyer has the right to test the quality of goods or check weighment does not prevent property in goods passing if seller has done every thing he was bound to do.

[N. R. CHATTERJEA J. Has property in the jute subsequently rejected passed to buyer?]

Yes, the property would pass subject to right of buyer to reject inferior goods. If these goods had not perished by fire, it would have been open to the defendants to refuse payment on ground of inferiority, etc. See Blackburn, 2nd edition, p. 174, 242—no longer

(1) (1872) L. R. 7 Q. B. 436, 449. (2) (1863) 2 H. & C. 200, 208.

the rule in England *re* anything remaining to be done, *e.g.*, weighment, etc., as a condition precedent. Defendants are not bound to weigh the goods at any particular time and yet the *fariah* can't sell these very goods.

[N. R. CHATTERJEA J. In *Turley v. Bates* (1), it is stated that the rule in Blackburn would not apply if anything remained to be done by buyer.]

For the purpose of delivering them in a proper condition, the seller would be entitled to sell rejected goods only. But the defendants would be bound to take delivery of all passable goods stored in their godown. See *Swanwick v. Sothern* (2) as to testing.

[N. R. CHATTERJEA J. Do not the goods pass only provisionally?]

No, only subject to the right to reject, or he might claim compensation, for the property in all the goods did pass. The fact that they insured these goods as their own is the strongest possible evidence—even if not conclusive—that the property in these goods had passed to them.

Cur. adv. vul.

N. R. CHATTERJEA AND RICHARDSON JJ. This appeal arises out of a suit for recovery of the price of jute supplied by the plaintiffs to the defendants. The jute while it was in the custody of the defendants in their godowns caught fire and was burnt, and the question is whether the plaintiffs or the defendants are to bear the loss. The determination of that question depends upon whether or not property in the goods had passed to the defendants, before they were destroyed by fire.

(1) (1868) 2 H. & C. 200, 203.

(2) (1839) 9 Ad. & E. 895.

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The plaintiffs and the defendants carried on business in jute at Chandpur, where there are many big firms who deal in jute. The plaintiffs who are called *fariahs* in the locality used to purchase loose jute from dealers (*beparis*) and supply it to the defendants' firm.

The plaintiffs in their plaint set up an express contract with the defendants, the terms whereof are stated to be as follows :—

That the plaintiffs would purchase loose jute for the defendants during the jute season, and that the latter would take the said jute from the plaintiffs upon weighment, and would pay the price of the same according to the market rate. The defendants would advance money from time to time for purchase of jute, and would pay the price of jute after the close of the *karbar* after deducting the amounts so advanced. The plaintiffs would buy jute and store the same in the godowns of the defendants and under their care, and report to the defendants the goods stored on the very day they are stored. The plaintiffs would have no right to the goods so stored nor would they be entitled to remove them from the godowns of the defendants, and that having once stored the goods in the godowns of the defendants, the plaintiffs would retain no other rights or interest in them than the right to receive the price of the goods, and that the ownership in the goods would pass to the defendants.

It is further stated in the plaint that this has been the local usage and practice observed at Chandpur, and the business of the defendants' firm ever since the establishment of their jute office at Chandpur had been carried on in accordance with the usage.

The plaintiffs state that the price of jute supplied by them to the defendants was Rs. 84,747-7 including that of the jute burnt, and deducting the amount

advanced (Rs. 68,408-5-6) they claim Rs. 18,585-8 being the balance due together with interest thereon.

The defendants denied that there was any express contract and also denied the usage set up in the plaint. They stated that the plaintiffs purchased jute after taking advances from the defendants, and having no godown of their own, stored it in the defendants' godowns at their own risk, that after the goods had been selected and weighed they were sold to the defendants and the price set off against the advances taken, and the goods which were rejected by the defendants were removed and sold by the plaintiffs to other persons. That according to the usage and practice observed in the dealings with the plaintiffs, the ownership in the jute which had not been selected and weighed, had not passed to the defendants, and the plaintiffs must therefore bear the loss of their own goods destroyed by fire. The Court below held that ownership of the goods did not pass to the defendants and accordingly dismissed the suit. The plaintiffs have appealed to this Court.

As to the contract alleged by the plaintiffs the Court below has held that it has not been satisfactorily proved. The only evidence on the point is that of the plaintiff Abdul Aziz and Mokunda. On the other hand, the defendant No. 1 Sarat swore that there was no contract, and the defendant No. 2 Ramani Mohan, who was examined after remand by this Court, also denied it. We have considered the evidence on the point, and agree with the Court below in holding that the agreement set up by the plaintiff has not been satisfactorily proved.

The transactions between the parties should therefore be held to be governed by the local usage of trade which prevails at Chandpur.

The plaintiffs have examined a number of

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witnesses, some of whom are very respectable, and the Court below has set out the material portions of the depositions of some of the witnesses in its judgment.

The mode of dealing between the *fariahs* and the Jute Companies at Chandpur, appears from the evidence of Mr. Mackertich (the manager of Messrs. Landale and Clark) to be as follows:—The *fariahs* purchase jute at their own risk and store it in the import godowns of the Companies (sometimes called the *fariah's* godowns), where all sorts of jute, good, bad and indifferent are mingled together, out of which the Company makes its selection for purchase. The *fariahs* report only the quantity, but not the quality, and they are accustomed to over-report the quantity in order to get larger advances from the firms. On measurement the quantity is generally found to be short. Before the Company purchases the jute from the import godowns (*fariah's* godowns) they select, approve and then weigh the goods. If there be moist goods, they are dried and sometimes sold to the Company, who has the option to reject moist jute, and bad and rotten stuff. The Company does not pay for rejected goods and the *fariahs* have a right to sell, and do sell rejected goods to other firms. From the import godowns the goods are taken after weighment to the selecting godowns where they are assorted. The price is settled after weighment, and the Company's purchase is complete after the price is settled which may be done a week after. After the weighment in the import godown it is taken that the goods are sold to the Company. The Company does not pay for the quantity found to be short, and the *fariahs* suffer the loss if any portion of the goods before weighment be stolen from the import godown. "The Company has got a lien on

the *fariahs*' goods so long as their advances are not paid off, and the property in the goods remains with the *fariahs* so long as the weighment is not made by the Company."

Plaintiffs' witness No. 7, Kailash Chandra Ghose, the book-keeper of Messrs C. C. Betts & Co., in his examination-in-chief says—"The goods are weighed when the Company takes them. After this weighment the Company becomes their owner. Before the weighment the goods are under their care only and in their trust," and Jagadish Chandra Ganguli a sub-agent of Messrs. Jardine, Skinner & Co. says—"If any loss takes place after the goods are stored and before they are purchased by the Companies the loss is borne by *fariahs*."

The plaintiff Abdul Aziz himself says that at Chandpur it is the rule of sale of goods that the bundles of jute are first counted, then weighed and then the price is settled per maund. He, however, says—"Our transactions with the defendants were not in accordance with this rule. Our mode of transaction is noted in the plaint." But the contract or usage set up in the plaint has not, as we have seen, been proved, and the evidence of the plaintiffs' own witnesses establish the fact that according to the usage of trade at Chandpur the sale is not complete until the goods are examined, selected and weighed by the Company.

The provisions of the Indian Contract Act relating to sale of goods which have any bearing on the case, are sections 79 to 81 and also sections 82 and 83. Section 79 says, that where there is a contract for the sale of a thing which has yet to be ascertained, the ownership of the thing is not transferred to the buyer until it is ascertained. Section 80 provides that where by a contract for the sale of goods, the seller

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is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done, and section 81 lays down that where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done. The distinction between a case where the seller is to do something to the goods, and a case where nothing remains to be done by the seller is pointed out in the two illustrations to the section. In illustration (a) which is taken from the case of *Simmons v. Swift* (1), the stack of bark is to be weighed and delivered by the seller, part of it is weighed and delivered to the buyer: the ownership of the residue is not transferred to the buyer until it has been weighed pursuant to the contract. In illustration (b) which is taken from the case of *Turley v. Bates* (2) the contract is to sell a heap of clay (as a whole) at a certain price per ton, the buyer is to load the clay in his own carts and to weigh each load at a certain weighing machine. Here nothing remains to be done by the seller, the sale is complete and the ownership of the heap of clay is transferred at once. Referring to the cases on the point, and to the rule that property does not pass where anything remains to be done to the goods for the purpose of ascertaining the price Channel B, observed in *Turley v. Bates* (2):—
“From a consideration of these cases it appears that the principle involved in the rule above quoted is that something remains to be done by the *seller*. It is therefore very doubtful whether the present case comes within the principle of the rule. But however that may be, it is clear that this rule does not apply if the parties have made it sufficiently clear

(1) (1826) 5 B. & C. 857.

(2) (1863) 2 H. & C. 290.

whether or not they intend that the property shall pass at once, and that this intention must be looked at in every case."

Similarly, in the case of *Shoshi Mohan Pal Chowdhry v. Nobokrishto Poddar* (1), there was a contract for the sale of 975 maunds of rice being the contents of a certain golah at a certain rate, the buyer to remove the whole of the rice after weighing on or before a certain date. The assignee from the buyer took delivery of a portion, but refused to take delivery of the residue on the ground that it was of inferior quality. The golah was accidentally burnt and the rice destroyed. It was held that the sale was complete and the ownership with the risk of loss in the rice sold passed to the buyer. With reference to the contention that the sale was not complete, because the rice remained to be weighed, the learned Judges observed that, so far as the vendor was concerned nothing remained to be done on his part to the rice sold, "for the purpose of ascertaining the amount of the price," and that the rice was to be weighed for the satisfaction of the purchaser.

It will be seen that in both the cases cited above *Turley v. Bates* (2) and *Shoshi Mohun v. Nobokristo* (1), the contract was for the sale of the whole of the goods, in the first case for the entire heap of clay, and in the second for the entire contents of the golah; the rate was fixed, and the buyer was to weigh goods apparently for his own satisfaction. Nothing therefore remained to be done by the seller, and the parties obviously intended that the ownership of the goods should pass forthwith.

In the case of *Martineau v. Kitching* (3), Cockburn, C. J. observed:—"I take it now to be perfectly clear

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(1) (1878) I. L. R. 4 Calc. 801. (2) (1863) 2 H. & C. 200.

(3) (1872) L. R. 7 Q. B. 436.

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especially after the case of *Turley v. Bates* (1), that the real question in all these cases is whether the parties did intend that the property should pass." The learned Chief Justice further observed as follows:—"We are dealing with the case of a specific chattel. I agree to sell to a man a specific thing, say a stack of hay or a stack of corn. I agree to sell him that specific thing and he agrees to buy it: the price undoubtedly remains an element of the contract, but we agree instead of fixing upon a precise sum that the sum shall be ascertained by a subsequent measurement. What is there to prevent the parties from agreeing that the property shall pass from one to the other, although the price is afterwards to be ascertained by measurement? I take it that is the broad substantial distinction. If with a view to the appropriation of the thing, the measurement is to be made as well as the price ascertained, the passing of the property being a question of intention between the parties it did not pass because the parties did not intend it to pass. But if you can gather from the whole circumstances of the transaction that they intended that the property should pass, and the price should afterwards be ascertained what is there in principle, what is there in common sense, or practical convenience, which should prevent that intention from having effect?" See also Blackburn on sales, 3rd Edition, pages 184 to 186.

It is clear, therefore, that when nothing remains to be done to the goods by the seller for the purpose of ascertaining the price, then *prima facie* the property in them passes although they have not been weighed by the buyer.

It would be otherwise, however, in England if the parties intended that property in the goods should not pass until the goods had been weighed.

(1) (1863) 2 H. & C. 200.

In our opinion the Indian Law is the same, and the provisions of section 81 do not exclude the question of intention which is laid down in the English cases as the determining factor.

We are also of opinion that the contract in the present case being in the first instance a contract for the sale of unascertained goods what remained to be done by the buyer to the goods appropriated to the contract by the seller was not merely for the purpose of ascertaining the price but was also for the purpose of placing the buyers in a position to say whether and to what extent they would for their part accept the goods offered to them. The following observations are relevant in either view of the case so far as they show on the one hand the actual intention of the parties and on the other the precise position of the buyer after the jute was placed in the *fariah's* godowns.

As we have already said, the plaintiffs' own witnesses prove that according to the usage of trade at Chandpur ownership of the jute does not pass to the buyer until it is examined, tested and weighed, and the transactions of the parties having been carried on in accordance with that usage, it is clear that, when the contract with which we have to deal was made, the parties did not intend that the property in the jute should pass until it had been tested and weighed.

Upon the question of weighment, it was contended that the weighment was only for the satisfaction of the buyer and that the latter could not by delay in weighing the goods prevent the transfer of ownership to him and as the evidence shows that the Company is bound to accept all "passable" goods stored in the import godowns, it is urged that the ownership passes to the buyer subject only to the right to reject bad goods.

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It appears; however, from the plaint itself, that the defendants were to take the jute from the plaintiffs "upon weighment," and the evidence shows that the *fariahs* and the Company have both got "Tally books"; both enter the weights in their respective books when the goods are weighed, and it is after the weighment that the Company removes the goods from the store godown to another godown. It is not therefore altogether clear, although this particular point need not be pressed, that the seller had nothing to do in connection with the weighing of the jute.

Then again there is the question of selection. The evidence shows that jute, good and bad, is stored in the import godown and the Company selects good jute and has the option of rejecting bad jute. Some stress was laid on behalf of the appellants, upon the fact that the Company is bound to purchase all "passable" goods stored in the import godown, and although they have the right to reject wet jute, there is some evidence to show that they are bound to purchase such jute when dried. But it is clear that the Company has the option to reject bad jute altogether, and even if the company is bound to purchase wet jute when dried, the *fariahs* have to dry it. The seller, therefore, in such a case has to do something to the goods to make them marketable.

Then the fact that the *fariahs* are not entitled to remove the goods nor to sell the same to other persons, once the goods are stored in the import godowns, is relied on. It is contended that the fact that the Company has a lien because they make advances for purchasing jute, cannot prevent the *fariahs* from selling it to other persons subject to the lien, and the fact that they cannot sell the jute to others shows that ownership passes to the Company. If, however, the usage of the trade is that the *fariahs* are not

entitled to sell the goods to persons other than the Company who advance monies for purchasing jute, or remove the goods from the godowns, the fact that the *fariahs* are not entitled to sell them to others, under those circumstances does not show that the property in the jute passes to the Company. The position seems to be that the buyer has a right to the custody of the jute as security for his advances, and that in addition while the seller has no right to sell to others, the buyer is under a corresponding obligation to buy as much of the jute as is of the requisite standard.

It may further be observed that the plaintiff Abdul Aziz refers to the store godown as "my godown" and the godown to which the goods are removed after weighment as the defendant's "own godown," although both godowns belong to the defendants. Mukunda Saha, the plaintiff in the analogous case says, with reference to entries of goods sold (*bikri*) in his books of account, that the goods not weighed and goods the price of which was not settled, were not entered as *bikri*. This shows that the plaintiffs themselves recognized that the sale was not complete until the goods had been tested and weighed and the price settled.

Lastly, the fact that the jute was insured by the defendants as their own is relied upon as strong evidence of the transfer of ownership. It appears that two insurances were effected—one for Rs. 10,000 and another for Rs. 20,000. An application was made for effecting a third insurance to the extent of Rs. 40,000, but the application arrived late at the insurance office, the jute having been burnt in the meantime. The application for insurance, and the policies were not produced. The letter written by the defendant No. 3, who was the agent of the Insurance Company, for effecting the third insurance, however, speaks of

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the jute as "belonging to the defendants", and under the circumstances it may be taken that the first two insurances were also effected on the jute as belonging to the defendants. But the defendants had an interest in the goods, and the insurance appears to have been intended for protection of their own interest in the jute, not for the protection of the seller's interest which they were not bound to insure. The insurance did not cover the entire quantity of the jute which was burnt.

The defendants, therefore, were entitled to apply the whole of the amount which they received under the policies of insurance to indemnify themselves against the loss which they themselves had actually sustained, and were not bound to apply any portion of it to the benefit of the plaintiffs.

It appears from the evidence, that several jute firms at Chandpur, bore the loss when jute was destroyed by fire, but Mr. Mackertich says "there is no one system or one rule at Chandpur by which all the Companies should bear the loss in case the goods stored in the *fariahs*' godowns are burnt. Each firm has got its own system."

It appears that in most of the cases spoken to by the witnesses, the jute was fully insured. It cannot be said therefore that any usage had been established to show that the loss is borne by the Company in cases where the jute is not insured to the full extent.

We are of opinion that the decree of the Court below is correct, and the appeal should be dismissed with costs.

G. S.

Appeal dismissed.

APPELLATE CIVIL.

Before Sanderson C.J. and Mookerjee J.

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May 2.

Appeal to Privy Council—Value of property, whether at date of institution of suit, or final decree—Whether plaintiff debarred from proving real value of property—Civil Procedure Code (Act V of 1908), s. 110.

The point of time to be considered (as to the value of the property) under the second paragraph of section 110 of the Code of Civil Procedure is the date of the judgment or final order under appeal to the Privy Council.

Allan v. Pratt (1), *Macfarlane v. Leclaire* (2), *Mohideen v. Pitchay* (3), *Dalgleish v. Damodar Narain* (4), *Bank of New South Wales v. Owston* (5), *Goorooopersad v. Juggut Chander* (6), *Moti Chand v. Ganga Pershad* (7) and *Nand Kishore Singh v. Ram Gulam Sahu* (8) referred to.

The question whether a tenancy is to be regarded as one at will or one of a permanent nature, is a matter in which a substantial question of law is involved.

Maharam v. Telamuddin (9) and *Raja Mukund Deb v. Gopi Nath Sahu* (10) referred to.

Where the plaintiff brought his suit in the Munsif's Court and paid court-fees on the annual rental of Rs. 4-4, he is not debarred from subsequently raising the point that the property in dispute was in fact of the value of Rs. 11,400.

*Application for leave to appeal to His Majesty in Council, No. 18 of 1915.

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| (1) (1888) L. R. 13 A. C. 780. | (6) (1860) 8 Moo. I. A. 166, 169. |
| (2) (1862) 15 Moo. P. C. C. 181. | (7) (1901) I. L. R. 24 All. 174 ; |
| (3) [1893] A. C. 193. | L. R. 29 I. A. 40. |
| (4) (1906) I. L. R. 33 Calc. 1286. | (8) (1912) I. L. R. 39 Calc. 1037. |
| (5) (1879) L. R. 4 A. C. 270. | (9) (1911) 15 C. L. J. 220. |
| (10) (1914) 21 C. L. J. 45. | |

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APPLICATION for leave to appeal to His Majesty in Council by Surendra Nath Roy and others, the plaintiffs.

The plaintiffs had brought an action for ejectment against one Dwarka Nath Chakravarti from a plot of land measuring 1 bigha 18 cottahs situate within the Municipality of Calcutta. The defence was that he was not a tenant from year to year as alleged by the plaintiff but a *mokorari mourusi* tenant holding under a registered lease in perpetuity; and that in any case he and his predecessors in interest having held the land for a long time at an uniform rate of rent, the tenancy must be presumed to be of a permanent character. The rent being only Rs. 4-4-3 per year, the suit was valued for purposes of court fees and for determining the forum of trial at Rs. 4-4-3, and was instituted in the Court of the Munsif at Alipore. On the 7th July 1913 he made a decree in favour of the plaintiff, holding that the tenancy was not of a permanent character. On appeal to the District Judge of Alipore the suit was dismissed on the 18th June 1914 as from the findings of fact arrived at by the Munsif he came to the conclusion that the tenancy was a permanent one. The plaintiffs then preferred a second appeal to the High Court which was summarily dismissed by D. Chatterjee and Chapman JJ. on 15th December 1914 at the hearing under Order XLI, rule 11 of the Code of Civil Procedure. They thereupon filed the present application for leave to appeal to His Majesty in Council. On 25th January 1916 Holmwood and Imam JJ. remitted the case to the Munsif for determination of the value of the subject matter of the suit. The Munsif found that the value of the lands had been growing rapidly in the neighbourhood in recent years; that three years ago several houses had been built by Europeans near

this land; that conveyances relating to those plots showed the rate to be over Rs. 300 per cottah, and he came to the conclusion that at the date of the order of the High Court (25-1-16) the value of the land in dispute was Rs. 11,400 at Rs. 300 per cottah.

Babu Dwarkanath Chakravarti (with him *Babu Tarak Chandra Chakravarti*, *Babu Hiralal Sanyal* and *Babu Kalikinkar Chakravarti*), for the appellants. The decision of this Hon'ble Court refusing the relief prayed for by the plaintiffs and confirming the decree of the District Judge involves directly or indirectly some claim or questions to or respecting property valued at Rs. 10,000 or upwards within the meaning of section 110 of the Code of Civil Procedure. The summary decision appealed from, although it does not state any question of law as being involved therein, does in reality involve such a question, because it confirms the decision of the Court immediately below. The question before the Courts below was whether on the facts found the tenancy was a permanent one or of a terminable nature, *i.e.*, whether on a given date an inference of perpetuity could be founded. This certainly is a question of law. The dismissal of my appeal under Order XLI, rule 11 was erroneous. In any case it only means, not that there is no substantial question of law involved in the case, but that the Hon'ble Judges who heard the appeal agreed with the District Judge as regards his inference of permanency. There is a decision of Jenkins C. J. in which leave to appeal was granted even when an appeal to the High Court was summarily dismissed under Order XLI, rule 11: *Chhatraput Singh Dugar v. Kharag Singh Lachmiram* (1).

Babu Jyotish Chandra Hazra, for the respondent.

(1) (1913) 17 C. L. J. 547.

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The enquiry by the learned Munsif and his report are incomplete. Upon such a report leave cannot be granted. The Munsif finds the value of the property at or about the time that enquiry into the valuation was directed to be made by this Hon'ble Court, and he finds the value to be about Rs. 11,500 on that date. That is not enough. He should have found what the value of the property at the date of the suit was and what its present value is. Judging from this fact that the suit for ejectment was originally instituted before a munsif, the value of the property could not have been at that time more than a thousand rupees ; and the plaintiff cannot now be allowed to say that its value was Rs. 10,000 or upwards. If he be so allowed, his suit was wrongly instituted before a Court that had no jurisdiction to try it, and, therefore, the judgments and decrees of the Courts below are nullities. It is quite conceivable from what the Munsif says that the value of the property has gone up in recent years by leaps and bounds and that the present value of the property is Rs. 11,500, but then under section 110, paragraph 1, the value of the property in the Court of first instance as well as before the Privy Council should be Rs. 10,000 or upwards. That is not, and cannot be, the case here.

[SANDERSON C. J. Would not this case come under paragraph 2 of section 110?]

I submit that this paragraph contemplates a different state of things altogether. It contemplates a case where the decree affects property less than Rs. 10,000, but where there are other things which depend on this decree, *e.g.*, mesne profits, interest, damages, or where there is another similar suit between the same parties, with respect to a similar cause of action, but where the value of the property in the suit itself has gone up in recent years, you cannot say that

the decree appealed from directly or indirectly affects property more than Rs. 10,000 in value. To give such a meaning to this paragraph would be to render nugatory the first paragraph. In fact, in that case the first paragraph would be unnecessary, and you can bring any case within the second paragraph when at any stage the value of the property in the suit has increased to Rs. 10,000. Then, even if there be a question of law, in this case there is not a substantial question of law. From certain facts the Munsif came to the conclusion that the tenancy was not a permanent one. From these facts the District Judge and the High Court came to the opposite conclusion. The High Court dismissed the appeal under Order XLI, rule 11. If there had been a point of law, the High Court would not have done that. So it can't be said that there is a point of law, much less a substantial point of law.

Babu Dwarkanath Chakravarti, in reply. We valued the suit at one year's rental, viz., Rs. 4-4-3, because under the Court Fees Act and Suits Valuation Act such suits for ejectment should be so valued. We come under the latter part of section 110, i.e., we show that the decree involves directly or indirectly a claim or question to or respecting property valued at that amount. So that in our case it is not necessary to show that the land was valued at that figure in the first Court. Even if it be essential, the report shows that the value reached the present figure in the neighbourhood three years ago: that would be when the suit was instituted or about that time.

SANDERSON C. J. This is an application by the plaintiffs for leave to appeal to His Majesty in Council. An action was brought by the plaintiffs against the defendants claiming ejectment from certain property. The plaintiffs allege that the defendants are tenants at

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will only, while the defendants allege that they had a permanent tenancy which had been granted by the plaintiffs' predecessor to the defendants' predecessor, and the Munsif before whom the action was brought gave judgment for the plaintiffs and came to the conclusion that the tenancy was a terminable one on notice. Then there was an appeal to the District Judge who accepted the findings of fact arrived at by the Munsif, but came to the conclusion that the tenancy was a permanent one and gave judgment for the defendants. Thereupon the plaintiffs applied to a Division Bench of this Court for permission that the appeal should be admitted under Order XLI, r. 11 of the Code of Civil Procedure. That application was rejected on the 14th December 1914. The applicant now asks this Court for leave to appeal to His Majesty in Council against the order of this Court dismissing his application under Order XLI rule 11.

The first question raised by the vakil for the Respondent is under section 110. He says that under that section the subject-matter of the suit must be of the value of Rs. 10,000 at the date of the institution of the suit, and also that it must be of that value at the date of the decree from which the appeal to His Majesty in Council is desired. Now, without deciding whether this case does come within the first paragraph of section 110 of the Code of Civil Procedure, as to which there may be some difficulty inasmuch as there was no evidence as to the value of the subject matter while this case was in the Court of first instance, I think this matter does come within the second paragraph of section 110 of the Code of Civil Procedure, seeing that the decree or final order involves directly or indirectly some claim or question to or respecting property of the value of Rs. 10,000. The decree or final order must be the decree or final

order from which the appeal is made, that is, the decree of the High Court of December 1914, and when one remembers that the question which it is desired to argue is this, whether upon certain given facts or data the tenancy is to be regarded as one at will or one of a permanent nature, it seems to me that this is a matter in which a substantial question of law is involved.

The other question which I have to consider is whether the property is of the value of Rs. 10,000 or upwards. We have the report which was made at the instance of the High Court, dated January 1916, which is to the effect that the property was worth Rs. 11,400. The learned vakil says that this is all very well. The property may have been worth Rs. 11,000 in 1916, but it does not follow that it was worth that amount at the date of the institution of the suit. I do not think myself that that is the material date. I think the material date is the date of the decree from which the appeal to the Privy Council is to be made and that date is admittedly December 1914. It may be said that even if that was the value of the property in January 1916, it does not follow that the value was the same in December 1914, inasmuch as according to the report the property has gone up by leaps and bounds within the last few years. When we look at the report, especially at the materials upon which the Munsif made his report, we find from the evidence given by the valuer that the property was valued at Rs. 300 a cottah. He corroborated his opinion by referring to two conveyances of the land in the immediate neighbourhood which are dated the 4th and 9th April 1914, and there seems to have been no other transaction subsequent to the dates on which the valuer based his opinion and consequently I think that the value arrived at by Mr. Warwick at Rs. 300

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per cottah may be taken to have been the value of the property in 1914. Therefore the value of the property was above the requisite amount in December 1914, and for this reason the case comes within the second paragraph of section 110 of the Code of Civil Procedure.

The property was at the date of the decree worth more than Rs. 10,000, but the learned vakil went on to argue that the plaintiff could not now assert that the property was worth Rs. 10,000, inasmuch as he brought his suit in the Munsif's Court and he paid court fees on the annual rental of Rs. 4-4.

Speaking for myself, I do not think that the plaintiff is debarred from raising the point that the property which is in dispute is in fact of the value of Rs. 11,400. It may very well be that at the time he instituted the suit he thought if he could, according to the Rules of the Court, bring his case within the jurisdiction of the Munsif he would be well advised to do so. The point taken by the learned vakil may have been a good one, for objecting to the jurisdiction of Munsif in the Court of first instance. At the most it could only be taken as an admission and it was one that might be rebutted by subsequent evidence that it was worth more than Rs. 10,000.

For these reasons, I think the application should be allowed and leave to appeal to His Majesty in Council granted.

MOOKERJEE J. I agree that the petitioners have established that their application for leave to appeal to His Majesty in Council fulfils the requirements of section 110 of the Code of Civil Procedure. The petitioners rely upon the second paragraph of the section which deals with cases where the decree involves, directly or indirectly, some claim or question to or respecting property of the amount or value of Rs. 10,000.

They do not rely upon the first clause which refers to cases where the amount or the value of the subject-matter of the suit in the Court of first instance is Rs. 10,000 or upwards, and the amount or value of the subject-matter in dispute on Appeal to His Majesty in Council is also the same sum or upwards. They cannot take advantage of the first clause, inasmuch as there are no materials on the record to show that the value of the subject-matter of the suit in the Court of first instance, or in the Court of Appeal, was of the prescribed amount. The trial Court, however, has reported that the value of the property affected by the decree is over Rs. 10,000. The finding of that Court is somewhat loosely expressed and it may be plausibly contended that the value as determined by that Court refers to the value in 1916. But the evidence on which the finding is based relates to transactions which took place in 1914, and, consequently, we may legitimately hold that the trial Court has found that the value of the property affected by the decree was above Rs. 10,000 in 1914. The suit, which was instituted in 1912, was decreed by the Court of first instance on the 7th July 1913. On appeal to the District Judge, the suit was dismissed by him on the 18th June 1914. A second appeal to this Court was dismissed under Order XLI, rule 11 on the 15th December 1914. This dismissal operates in law as an affirmance of the decree of the District Judge. The petitioners now pray for leave to appeal to His Majesty in Council against the decree of this Court dated the 15th December 1914, and the question consequently arises, with reference to what point of time is the value of the property affected by the decree to be determined for the purposes of section 110. In my opinion, it is plain that when section 110 provides that the decree must involve, directly or indirectly, some claim or question

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to or respecting property of the value of Rs. 10,000 or upwards, the intention of the Legislature is that the value is to be determined with reference to the date of the decree under appeal. This view is supported by the decision of the Judicial Committee in *Allan v. Pratt* (1) where the Earl of Selborne quotes with approval the observation of Lord Chelmsford in *Macfarlane v. Leclaire* (2) "that the judgment is to be looked at as it affects the interests of the party who is prejudiced by it and who seeks to relieve himself from it by appeal; if there is to be a limit of value at all, that seems evidently the right principle on which to measure it. The proper measure of value for determining the question of the right of appeal, is the value of the judgment." It is on this principle that the Judicial Committee, in *Mohideen v. Pitchay* (3), held that in determining the value for the purposes of an appeal, the mesne profits up to the date of the decree are to be taken into account, and this view was followed by this Court in the case of *Dalgleish v. Damodar Narain* (4). The same principle was adopted by the Judicial Committee, when in the cases of *Bank of New South Wales v. Ows-ton* (5), *Gooroopersad v. Juggut Chander* (6), *Moti Chand v. Gangai Pershad* (7), they ruled that interest up to the date of judgment is to be taken into account in determining whether the appealable value has been reached or not: *Nand Kishore Singh v. Ram Gulam Sahu* (8). In my opinion, it is perfectly plain that under section 110 the point of time to be considered is the date of the judgment under appeal. If this

(1) (1888) L. R. 13 A. C. 780.

(5) (1879) L. R. 4 A. C. 270.

(2) (1862) 15 Moo. P. C. C. 181.

(6) (1860) 8 Moo. I. A. 166, 169.

(3) [1893] A. C. 193.

(7) (1901) I. L. R. 24 All. 174 ;

(4) (1906) I. L. R. 33 Calc. 1286.

I. R. 29 I. A. 40.

(8) (1912) I. L. R. 39 Calc. 1037.

principle is adopted, there is no room for controversy that in the case before us, the decree against which leave to appeal is sought does affect property of the value of Rs. 10,000 and upwards.

The only other question is, whether the decree appealed against, which is in affirmance of the decree of the Court immediately below, involves a substantial question of law. As already explained by the Chief Justice, the question in controversy relates to the nature of the tenancy held by the defendants under the plaintiffs; was that a permanent tenancy or a tenancy terminable by notice to quit? The District Judge has in effect accepted the findings of the Court of first instance, but he has drawn from those findings a conclusion precisely contrary to that drawn by the trial Court. The question thus is, what inference may legitimately be drawn from the facts found, and this clearly is a mixed question of fact and law, as appears from a long line of case reviewed in *Maharam v. Telamuddin* (1) and *Raja Mukund Deb v. Gopi Nath Sahu* (2). In my opinion, there is no room for doubt that the appeal does involve a substantial question of law, and that a certificate must consequently issue that the case fulfils the statutory requirements both as regards nature and value.

G. S.

Leave granted.

(1) (1911) 15 C. L. J. 220.

(2) (1914) 21 C. L. J. 45.

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LETTERS PATENT APPEAL.

Before Sanderson C.J. and Mookerjee J.

MEAJAN MATBAR

v.

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May 10.

Evidence—Admissibility—Conversation between defendant and plaintiff's pleader when suit in contemplation, if admissible in evidence—Admission made by one defendant evidence against all others—Evidence Act (I of 1872), ss. 18, 23.

In a suit for rent, there was a talk of settlement between the plaintiff's pleader and one of the defendants when the suit was about to be instituted:

Held, that the mere fact of the conversation taking place when the parties were contemplating that a suit might be instituted is not in itself sufficient to prevent the conversation from being put in evidence.

Wallace v. Small (1), *Watts v. Lawson* (2), *Nicholson v. Smith* (3), *Harding v. Jones* (4) and *Jorden v. Monzy* (5) relied on.

Mohabeer Singh v. Dhujjoo Singh (6) discussed.

When several persons are jointly interested in the subject-matter of a suit, an admission by one of them is receivable in evidence not only against himself, but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.

Kowsulliah Sundari Dasi v. Mukta Sundari Dasi (7), *Chalho Singh v. Jharo Singh* (8) and *Ahinsa Bibi v. Abdul Kader Saheb* (9) referred to.

Kali Kisore Chowdhury v. Gopi Mohan Roy Chowdhury (10) distinguished.

* Letters Patent Appeal No. 79 of 1913, in Appeal from Appellate Decree No. 357 of 1911.

(1) (1830) Moo. & M. 446.

(2) (1830) Moo. & M. 447n.

(3) (1822) 3 Starkie 128.

(4) (1835) T. & G. 135.

(5) (1854) 5 H. L. C. 185, 245

(6) (1873) 20 W. R. 172.

(7) (1885) I. L. R. 11 Calc. 588.

(8) (1911) I. L. R. 39 Calc. 995.

(9) (1901) I. L. R. 25 Mad. 26.

(10) (1897) 2 C. W. N. 166.

APPEAL by Meajan Matbar, the plaintiff.

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This appeal arose out of a suit to recover Rs. 554-8 on account of rents and interest in respect of a *dar-ijara patni* of Rs. 388 held by the defendants. The defendants who were five in number were the heirs of the original lessee. The first three defendants only contested the suit and pleaded payment of the rents in full. The Court of first instance found the plea of payment to be untrue and decreed the suit, relying mainly on the deposition of the plaintiff's pleader who had a conversation with defendant No. 2 about settlement of the case, at the time the suit was instituted.

On appeal, the District Judge dismissed the appeal with costs. The contesting defendants thereupon appealed to the High Court, raising *inter alia* for the first time the question of the admissibility of the pleader's evidence. They also contended that the admission of defendant No. 2 was no evidence against the other defendants. Chapman J. (sitting singly) upheld these contentions of the appellants before him and decreed the appeal and remanded the case to the lower Court "for decision upon the evidence after leaving out of consideration the evidence given by the plaintiff's pleader."

The plaintiff appealed under s. 15 of the Letters Patent and attacked the judgment of Chapman J. on all points and contended that a new point based on facts should not have been allowed to be raised for the first time in this Court, that the case was concluded by the concurrent findings of fact in the Courts below and that at any rate the High Court should have finally decided the case on the evidence on record omitting any evidence that it might find inadmissible.

Babu Jogesh Chandra Roy (with him *Babu Prokash Chandra Majumdar*), for the appellant. The

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pleader's evidence as to the talk of compromise is admissible in evidence under s. 23 of the Evidence Act. Moreover, no objection seems to have been taken to the admissibility of that evidence in the Courts below. There is no evidence and there is no finding that the parties agreed not to use the conversation on question in evidence. And the first conversation took place long before the filing of the suit.

Secondly, the conversation in question is only one item of the evidence. The remaining evidence in the record is sufficient for the decision of the Court.

Thirdly, the admission of defendant No. 2 can be treated as evidence against his co-sharers: *Kowsulliah Sundari Dasi v. Mukta Sundari Dasi* (1). *Chalho Singh v. Jharo Singh* (2).

Babu Rajendra Chandra Guha, for the respondents. The admission sought to be proved is irrelevant under the second clause of section 23 of the Evidence Act. Circumstances disclosed in the pleader's evidence warrant the inference that defendant No. 2 entered into the conversation with the pleader, regarding the compromise, on an implied understanding that evidence of it should not be given against him. He could not have dreamt even that such loose talk of compromise would be used in evidence against him as an admission. Litigants in this country are often illiterate and they cannot be expected to stipulate, for their protection, that such a conversation would be without prejudice. The very fact that the admission was nothing but a *bonâ fide* talk of compromise should render it irrelevant under s. 23. The fact that the conversation took place some time before the suit was filed, while the pleader was preparing the draft of the plaint, is immaterial, as the intention of the defendant apparently was to save costs, etc., in case the matter

(1) (1885) I. L. R. 11 Cal. 588. (2) (1911) I. L. R. 39 Cal. 995.

was ultimately compromised. That strengthens my case. See *Mohabeer Singh v. Dhujoo Singh* (1) and Taylor on Evidence, s. 795 (middle). An erroneous omission to object to such evidence does not make it admissible: *Miller v. Madho Das* (2).

The admission of defendant No. 2 is not admissible against his co-tenants, except on the ground of his having express or implied authority under s 28. There is no suggestion of such authority in the record. *Kali Kisore Chowdhury v. Gopi Mohan Roy Chowdhury* (3). Reported cases do not go further.

SANDERSON C. J. This is an appeal from the judgment of Mr. Justice Chapman by which he set aside the judgment of the officiating Additional District Judge of Dacca whereby he affirmed the judgment of the learned Munsif.

The action was brought for rent by the plaintiff, and the defence was that the rent had in fact been paid. The learned Munsif found that it had not been paid.

The learned officiating District Judge investigated the facts and came to the conclusion, as the learned Munsif did, that the rent had not in fact been paid; and, he said in his judgment, "The learned Munsif has disbelieved the witnesses to payment for cogent reasons and these have not been met." Then, after making a few observations, he goes on to say, "the determining factor in the case is the evidence of the plaintiff's pleader. He deposes that defendant No. 2 came to him before the suit and asked him to make a settlement," and on reference to the evidence it appears that the interview to which the learned District Judge was referring was about a month before the suit was instituted. The form of settlement was

(1) (1873) 20 W. R. 172.

(3) (1897) 2 C. W. N. 166.

(2) (1896) I. L. R. 19 All. 76; L. R. 23 I. A. 106.

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suggested, viz., diminution of interest. On the day the suit was filed, defendant No. 2 again came with a relation and asked the pleader not to file the deficit Court-fee stamps but to make a compromise." Now, the learned Judge who has allowed the appeal from the District Judge came to the conclusion that this evidence of the plaintiff's pleader ought not to have been admitted; and the learned vakil for the defendants has supported his judgment upon this ground. He says, that reference must be made to section 23 of the Indian Evidence Act, which runs in this way: "In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given." Now, it is admitted by the learned vakil for the defendants that this case does not come within the first branch of that section; or, in other words, he agrees that there was no express condition that the evidence of this conversation or interview should not be given. But he says that it does come within the second branch of it, because he argues that there were circumstances from which the Court could infer that the parties agreed together that the evidence of it should not be given. The learned Judge, Mr. Justice Chapman, has taken that view, and he says, "that evidence was to the effect that one of the defendants had approached him at the time when the suit was filed and subsequently for the purpose of compromise." It is to be pointed out, first of all, that the learned Judge has somewhat misunderstood the evidence in the case, because the first interview between the defendant No. 2 and the plaintiff's pleader was at least a month before the suit was instituted, and was not at the time when the suit was filed, as the learned Judge says it was; we have to

see whether there are any circumstances in this case from which we can infer that there was an understanding between the plaintiffs' pleader and the defendant No. 2 that the conversation which they had about the settlement of this suit should not be given in evidence against the defendants. I did not see those circumstances and I asked the learned Vakil yesterday what they were; and, so far as I can make out from his argument, they were, that inasmuch as there was a suit about to be instituted, and inasmuch as this conversation was about a compromise of the claim, it must be inferred that it was intended by the parties that that conversation should be a *privileged* conversation or should be a conversation *without prejudice*. I do not think that the mere fact that it was contemplated between the parties that the suit was about to be instituted prevents the conversation as regards a settlement of the claim from being given in evidence.

My opinion is supported by the case to which my attention was drawn by my learned brother Mr. Justice Mookerjee and which was decided so long ago as 1830 by Chief Justice Lord Tenterden, in *Wallace v. Small* (1). There the action was upon an *assumpsit* on a Charter party: there were some difficulties in fixing the defendant with the contract. It appeared, however, that after the action was brought—I draw attention to that because the conversation in the present case was at least a month before the action was brought, while in that case [*Wallace v. Small* (1)] it was after the action had been brought—an offer of a specific sum had been made; and evidence was given on the part of the plaintiffs that a friend of theirs in consequence went to the defendants and advised them to increase their offer and that the defendants refused to do so saying, we shall lose enough by the Charter party as it is. The witness

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stated that nothing was said about this communication being without prejudice. The Attorney-General for the defendants argued that the evidence was inadmissible and he said that "from the very nature of the transaction it appears to have been a negotiation for a compromise"—the very argument which the learned vakil put forward in this case—"and, if so, it must be understood to be without prejudice, although nothing is said on that subject at the time, nor does it, even if admitted, amount to any proof of liability." There the learned Chief Justice said that the evidence ought to be admitted; and, he also said, he thought it good *prima facie* evidence of liability. He said "it is not said to be without prejudice and an offer to compromise may be very well made, without any restriction as to confidence." That is entirely in accordance with my judgment, and not only that, but with my experience. The mere fact of the conversation taking place when the parties were contemplating that a suit might be instituted is not in itself sufficient to prevent the conversation from being put in evidence. That really disposes of the first conversation. I ought to mention in connection with that, that when the case was being tried in the Court of first instance, no objection was taken by those who were appearing on behalf of the defendants to the conversation, which took place a month before the institution of the suit, being given in evidence. That of course is not conclusive, but it is some evidence at least that the parties themselves did not regard that conversation as being a privileged conversation.

Then it is said that the second conversation which took place about the time of the filing of the suit is privileged. It is quite true that objection was taken to that being given in evidence, in the first Court. But it seems to me that the second conversation was a

natural consequence of the first conversation which took place a month before. As I understand, it only amounted to this, that the defendant must have obtained information that the suit was filed and that the deficit court-fee had not yet been paid, and he and a relation went to the plaintiff's pleader, and in fact asked for time in order to see whether the suit might not be compromised. Having formed the opinion, as I have said before, that the second conversation followed as a natural consequence of the first, and that the first conversation was not privileged, I do not think that any difference can be drawn between the first and the second conversation, as to their being admissible in evidence.

A subsidiary point was taken by the learned vakil on behalf of the defendants that the learned District Judge had misunderstood the effect of the evidence as to the second conversation, namely, that the learned District Judge said that it was the defendant No. 2 who took part in the conversation on the second occasion, whereas as a matter of fact it was the relation who went with him who made the offer of compromise. I really think that it is too small a point to require any serious consideration, because that was a conversation which took place in the presence of defendant No. 2 and it must be taken to have been made with his authority.

The other point upon which the learned vakil relied was that, even if the conversation was rightly admitted, it ought to have been admitted only as against the defendant No. 2 who is supposed to have made the admission. I think that the learned Judge did take it as being an admission against all the defendants, and therefore it is necessary to consider whether the admission made by the defendant No. 2 can be taken in evidence against all the defendants.

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In my judgment, it can. The question depends upon section 18 of the Indian Evidence Act which runs in these terms, "statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them are admissions." Here again there is no express authorization of the defendant No. 2 to make these admissions. If these admissions are to be taken against all the defendants they must come within the implied authority by the other defendants to him. Now, it was pointed out by Sir Richard Garth when he was the Chief Justice of this Court, in the case of *Kowsulliah Sundari Dasi v. Mukta Sundari Dasi* (1), that this section which I have just read is a concise statement of the law which was I think correctly laid down in Mr. Taylor's Book on Evidence, because the learned Chief Justice says at page 590, "where there are several co-contractors or persons engaged in one common business or dealing, a statement made by one of them with reference to any transaction which forms part of their joint business, has always been held admissible as evidence as against the others." Then he refers to the passage in Taylor on Evidence, Volume I, 1st edition, p. 489, section 525 (which is now section 543):—"When several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered." Then he, further says, "The principle

of this rule is, that for the purpose of making these statements with reference to the joint concern or common subject of interest one partner or co-contractor is considered to be the agent of the others; and this rule, as I take it, is enacted, though in a somewhat concise form in section 18 of the Indian Evidence Act." In my judgment, the defendants in this case can be looked upon as co-contractors, as they were joint tenants of the plaintiffs. In one sense they may be looked upon as partners. When one of those contractors or partners comes to the plaintiff's pleader for the purpose of seeing whether he cannot settle the action which was brought by the plaintiff against all the defendants, it seems to me that he must be implied to have authority to act on behalf of all the defendants. For these reasons I think the evidence was rightly admitted, not only as against the defendant No. 2 but as against all the defendants; and, consequently, that evidence having been rightly admitted I think the learned Judge Mr. Justice Chapman was wrong and that this appeal ought to be allowed. The result is that the judgment of the District Judge is restored. The defendants will have the costs both in this appeal and the appeal before Mr. Justice Chapman.

MOOKERJEE J. I am of opinion that upon each of the two questions of law involved in this appeal, the rule has been too broadly formulated by Mr. Justice Chapman, and that if the principles applicable are duly qualified, his judgment cannot possibly be sustained.

The plaintiff brought this suit against the defendants for recovery of arrears of rent due under a lease executed in favour of their father on the 3rd February, 1897. The substantial defence was a plea of payment. This plea was overruled concurrently by both the

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Courts below. Upon appeal to this Court Mr. Justice Chapman has reversed the decision of the District Judge and has remanded the case for reconsideration on the ground that the decision of the District Judge was based on evidence inadmissible in law.

The evidence to which exception is taken is that of the pleader for the plaintiff, who deposed that the second defendant had come to him before the institution of the suit and had asked him to arrange for a settlement by way of remission of interest. The District Judge held that this request for remission of interest was an indirect admission that the whole of the amount claimed was due; in other words, that the plea of payment was untrue. On behalf of the defendants, it was argued before Mr. Justice Chapman, *first*, that that evidence was not admissible to prove that the defendant had proposed a settlement and had thereby indirectly admitted the claim; and, *secondly*, that even if the admission was held admissible as against the second defendant, it could not be used as against the other defendants. Mr. Justice Chapman has given effect to both these contentions.

As regards the first objection, Mr. Justice Chapman observes that the Courts below did not consider the application of section 23 of the Indian Evidence Act, and that it was quite clear that, having regard to the time when the offer of compromise was made, it was made on the understanding that evidence of it would not be given in the case. Now, section 23 provides that "in civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given." It is not disputed that in the case before us, there was no such express condition. Consequently, the defendants can

rely only on that portion of section 23 which provides for the exclusion of an admission made under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given. The judgment of Mr. Justice Chapman does not specify the circumstances from which, in the present case, this inference could be drawn. Apparently he assumed that because an offer of compromise was made, there was necessarily an implied understanding that evidence of it would not be given in the case. This view is supported, to some extent, by the observation of Mr. Justice Phear in the case of *Mohabeer Singh v. Dhujjoo Singh* (1), where the following statement will be found: "It is a rule which all Courts of Justice find it right to observe that nothing that passes between the parties to a suit in any attempt at arbitration or compromise, should be allowed to effect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court; unless this were so, the only thing which could be prudently recommended to suitors would be never to listen for one moment to any proposal to settle the matter or to compromise it after it had come into the Civil Court." This proposition was enunciated in respect of a case not governed by the provisions of the Indian Evidence Act, 1872. It is consequently not necessary for me to consider whether the statement was a correct exposition of the law as it stood before 1872. But, in my opinion, the rule enunciated in the judgment mentioned is expressed too broadly, in view of the provisions of section 23 of the Indian Evidence Act. "An offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice, or to make a concession," is "rejected, though nothing at the time was expressly said respecting its confidential

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character," only "if it clearly appears to have been made" on "the faith of a pending treaty, into which the party was led by the confidence of an arrangement being effected." In the absence, however, of any express or strongly implied restriction as to confidence, an offer of compromise is clearly admissible and may be material as some evidence of liability, although, as has been said, it may not be proper to enquire into the exact terms offered, as such an offer might have been made for the sake of purchasing peace and without any intention to admit liability to the extent of the claim. That this is the true rule is obvious from the decisions in *Wallace v. Small* (1), *Watts v. Lawson* (2), and *Nicholson v. Smith* (3). The rule is also well illustrated by the decision in *Harding v. Jones* (4), where the fact that the drawer of a bill whose signature was in issue had proposed a settlement was used against him as his admission. Reference may in this connection be also made to the observations of Lord St. Leonards in *Jorden v. Money* (5), with reference to negotiations between an attorney on one side and the opposite party: "when an attorney goes to an adverse party with a view to a compromise, or to an action, you must always look with very great care at his evidence of what then occurred. There must be such a disposition in an attorney who has brought an action, to maintain it, that it is always very desirable that the attorney should abstain as much as possible from talking to a person, when he means afterwards, to swear to the conversation, and upon that conversation to found a right which otherwise might not be found to exist." These observations would have been obviously superfluous, if, as has been contended by the

(1) (1830) Moo. & M. 446.

(3) (1822) 3 Starkie 128.

(2) (1830) Moo. & M. 447n.

(4) (1835) T. & G. 135.

(5) (1854) 5 H. L. C. 185, 245.

respondent in this case, all negotiations for settlement between the attorney on one side and the opposite party had been, by reason of a rigid and inflexible rule, always inadmissible in evidence. I hold accordingly that the evidence of the pleader for the plaintiff as to what had passed between him and the second defendant for the settlement of the case was admissible in evidence. This view is strengthened by the circumstance that no objection was taken in the trial court to the reception of a portion at any rate of the statement made by the pleader.

As regards the second objection, Mr. Justice Chapman has held that the evidence of the pleader only proved an admission by the second defendant and that such admission is no evidence against the other defendants. In support of this view, reference has been made on behalf of the respondents to the decision in *Kali Kisore Chowdhury v. Gopi Mohan Roy Chowdhury* (1). In my opinion, the contention that an admission by one defendant is not receivable in evidence as against another defendant is too broadly formulated. The cases to which reference has been made on behalf of the appellant, viz., *Kowsulliah Sundari Dasi v. Mukta Sundari Dasi* (2) and *Chalho Singh v. Jharo Singh* (3), show that under section 18 of the Indian Evidence Act, an admission by one defendant may, in certain circumstances, be admissible in evidence as against another defendant. The principle is that when several persons are jointly interested in the subject-matter of the suit, an admission of any one of these persons is receivable not only against himself but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and

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(1) (1897) 2 C. W. N. 166.

(2) (1885) I. L. R. 11 Calc. 588.

(3) (1911) I. L. R. 39 Calc. 995.

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be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. Now, in the case before us, the defendants have been jointly sued as the representatives in interest of the original tenant. As was explained in *Ahinsa Bibi v. Abdul Kader Saheb* (1), in cases of contracts where one of the contracting parties dies, the right or obligation under the contract passes to his representatives as one entire juristic person. In the case before us, the defendants are jointly liable to the plaintiffs as the representatives in interest of their father, who was the original tenant and obtained the lease. We cannot consequently hold that the evidence is admissible as against the second defendant and not admissible as against the others. The result of the acceptance of the contrary view would be that as against the second defendant the Court would have to hold that the plea of payment was untrue and that the plaintiff was entitled to a decree for the entire sum; while, as against the other defendants, the Court would be driven to the conclusion that the plea of payment was established, and that, so far as they were concerned, the plaintiff was not entitled to a decree for the whole sum. But it is perfectly clear that the only possible decree which can be made in the suit is a joint decree for the entire sum found payable by all the defendants jointly as representatives of the original tenant. In my opinion, it is plain, upon principle as also upon the authorities, that the admission was rightly used by the District Judge not merely against the second defendant but also against the other defendants. On these grounds, I agree that the decree made by Mr. Justice Chapman must be reversed and that of the District Judge restored with costs.

S. M.

Appeal allowed.

(1) (1901) I. L. R., 25 Mad. 26.

APPELLATE CIVIL.

Before Teunon and Sheepshanks JJ.

DURGA DAS KHAN

v.

ISHAN CHANDRA DEY.*

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May 16.

Estoppel—Will by Hindu mother in favour of daughter and then to son's son, if any—Legatee estopped from denying title of remainderman—Adverse possession, if any.

Where a Hindu mother purported to bequeath her husband's property to her daughter with a proviso that if male children should be born to her (testatrix's) son (who survived her) they should succeed to the whole estate, and the daughter entered into possession under the will and carried out all its provisions. In a suit brought by the purchaser from the son's son against the purchaser from the daughter's son :—

Held, (i) that the will was invalid because the testatrix had no interest of which she could dispose by will, and it further contained an ineffectual bequest to unborn grandsons; (ii) that the daughter (legatee) and her successor in title by her acceptance of the will were estopped from disputing the title of the son's son (remainderman); and (iii) that the principle that a person who accepts a position conferred on him or her by a will cannot at the same time repudiate so much of the will as conveys an interest to another person, governed the case.

Board v. Board (1) and *Rupchand Ghose v. Sarbessur Chandra Chander* (2) referred to.

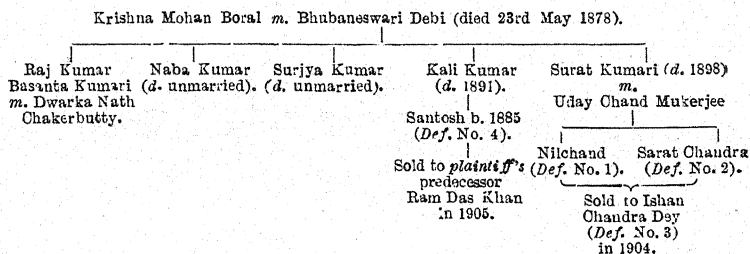
SECOND APPEAL by Durgadas Khan and others, the plaintiffs.

* Appeal from Appellate Decree, No. 173 of 1912, against the decree of S. K. Ghose, Additional District Judge of Hooghly, dated Jan. 3, 1912, reversing the decree of Paresb Nath Chatterjee, Additional Subordinate Judge of Hooghly, dated Jan. 24, 1910.

(1) (1873) L. R. 9 Q. B. 48, 53, 54. (2) (1906) 3 C. L. J. 629, 634.

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The property in dispute was originally owned by one Krishna Mohan Boral. The following genealogical table will show the relationship of the parties :—



On Krishna Mohan's death the property was inherited by his four sons in equal shares. This suit is in regard to the share of Surjya Kumar who died childless. Naba Kumar sold his share to Uday Chand Mukerjee and Kali Kumar sold his share to Uday's brother, Paran. On Surjya's death his share devolved on his mother Bhubaneswari, who died leaving a will by which she disinherited her son Kali and left all her properties to her daughter Surat Kumari. Plaintiff's predecessor Ram Das Khan purchased the property from Kali's son Santosh, defendant No. 4; while the defendant No. 3 purchased it from the sons of Surat Kumari, defendants Nos. 1 and 2. The dispute was between these two rival purchasers. The Additional Subordinate Judge of Hooghly on 24th January 1910 decreed the plaintiff's suit holding (i) that Bhubaneswari's will was in the nature of a colourable transaction and conferred no right in the property in dispute; (ii) that the suit was not barred by limitation; (iii) and that the plaintiff's claim was not barred by estoppel. On appeal by the defendant No. 3, this decision was reversed by the Additional District Judge of Hooghly on 3rd January 1912. He held (i) that the purchase by the plaintiff's predecessor in interest from defendant No. 4 was not, while defendant No. 3's purchase from defendants Nos. 1 and 2 was *bona fide*;

(ii) that though the will was invalid, Kali consented to it, and he and his heirs were therefore bound by such consent; (iii) and that the suit was barred by limitation; and (iv) estoppel. The plaintiffs and defendant No. 4 thereupon preferred an appeal to the High Court on the 30th January 1912; but as Santosh, defendant No. 4, did not by oversight sign that vakalatnamah though his name appeared in the memorandum of appeal as an appellant, on the 5th September he obtained an order of the Court to file his vakalatnamah through Mr. G. Sircar, vakil.

Sir Rashbehary Ghose (with him *Sir S. P. Sinha*, *Babu Mahendra Nath Roy*, *Babu Dharendra Lal Kastgir* and *Mr. G. Sircar*), for the appellants. The plaintiffs are the appellants. The suit is regarding the validity of a testamentary disposition by a lady—a Hindu mother. (Reads the genealogical tree.) *Primâ facie* Santosh would be the heir of Surjya Kumar. The lady, Surjya Kumar's mother, had no right to make a testamentary disposition, having only a qualified mother's right, and yet the learned District Judge says that her will, being made with the consent of Kali Kumar, he and his son are precluded from objecting to this will. We say that the will was made in trust for Kali Kumar's son, apart from the testamentary capacity of Bhubaneswari. Therefore, no question of limitation can arise even if it were only a secret trust. The District Judge has found that the transaction was not a *bonâ fide* conveyance, but a speculative transaction. I submit that is a question that can be raised by Santosh, my vendor, and not a third party. Santosh, on the other hand, supports me and is appearing in this Court as an appellant.

[*Babu Ram Chandra Mazumdar*, for the respondent, objected to the Santosh filing his vakalatnamah long after this appeal was filed in the High Court.]

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There is no substance in this objection. Kali Kumar's son not being born at the time of the will the lower Appellate Court has held the gift to her grandson to be void; but even that would not have the effect of enlarging the estate of Surat Kumari.

[TEUNON J. Your case is that this widow had nothing to bequeath.]

Yes. Then there is the question of limitation also. If there was a secret trust, then no question of limitation would arise. *Vide* section 10 of the Limitation Act. In any case, under the will, after Kali Kumar's son attained the age of 25 years, Surat Kumari would not have any right, even if the gift to the grandson be void, for her estate would not be enlarged thereby. The only arguable question is whether or not the suit is barred by limitation.

[TEUNON J. Adverse possession, if any, runs from the death of the testatrix in 1878.]

Babu Mahendra Nath Roy, for the appellant, (followed by leave of Court, as Sir Rashbehary Ghose was unable to conclude his arguments.) My submission is that from the facts found the legal inference to be drawn is that Surat Kumari's possession was not adverse to Kali Kumar and, after his death, to Santosh. As the will is invalid it is not open to Surat Kumari's heirs to claim adversely to Santosh. Further, Surat Kumari having entered into possession under a void will would be estopped from setting up an adverse title to remainderman. See *Board v. Board* (1), the principle of which decision has been followed in some cases in this country. That case is almost on all fours with the present one. See also *Rup Chand Ghose v. Sarbessur Chandra Chander* (2), which was decided by Woodroffe J. Santosh was given a remainder that was invalid by reason of being a gift to one unborn;

(1) (1873) L. R. 9 Q. B. 48, 53, 54. (2) (1906) 3 C. L. J. 629, 634.

and so was Surat Kumari's bequest also invalid, being made by a Hindu mother or widow. She is, therefore, estopped from saying that Kali Kumar's title is extinguished by her adverse possession. Santosh was 24 years of age when this suit was brought.

[TEUNON J. Before Santosh was born, Surat Kumari could only assert a limited interest.]

Yes, as a sort of trustee. As to estoppel, see Caspersz on Estoppel, 4th Ed., article 256, at page 254, and also section 115 of the Evidence Act. Surat Kumari's interest cannot therefore be enlarged. The will operated as a secret trust for the benefit of Kali Kumar's heirs, and therefore the trustee and her sons cannot plead adverse possession. The finding that Surat Kumari's possession was adverse is a wrong inference of law. The fact of Santosh, defendant No. 4, being a party to this appeal puts it out of the mouth of the defendant No. 3 to question the passing of consideration.

Babu Ram Chandra Mazumdar (with him *Babu Hari Charan Ganguli* and *Babu Sailes var Sen*), for the respondents. The appellants' argument is based on a wrong hypothesis that inasmuch as Surat Kumari paid Kali Kumar Rs. 5 monthly (the whole income of the property) her possession could not be adverse to Kali Kumar. There was no provision in the will to make any payment to Kali Kumar; so if any payment were made to Kali Kumar it must have been made out of charity. This provision for unborn person is wholly void under the Hindu Law: *Tagore v. Tagore* (1). Surat Kumari's possession was adverse against the reversioners.

As regards the English and Indian cases cited by the appellant, *Board v. Board* (2) started with a will

(1) (1872) 9 B. L. R. 377;

(2) (1873) L. R. 9 Q. B. 48, 53, 54.

18 W. R. 359.

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that could pass a good title to the legatees and so one could not set up a hostile title to the legatees.

[TEUNON J. In *Board v. Board* (1) also the testator had no property to devise.]

The plaintiff claimed under the remainderman. Does Santosh claim as remainderman or under remainderman? For ought we know the gift to Surat Kumari might be an absolute one but for the later clause. Santosh can come only as reversioner after the death of Bhubaneswari or on some other occasion, but not as remainderman. One party can set up an absolute title as against the other, having derived title from the same person. Had both parties derived title under the same document estoppel would arise. Not so here as Santosh comes as reversioner and not remainderman. It was never the case of plaintiff that Santosh was the remainderman under the will. As to the contention of there being a secret trust and in consequence no adverse possession, I submit it must be communicated. It must be pleaded and found. See *Jones v. Badley* (2) followed in *Kali Charan Ghosal v. Ram Chandra Mandal* (3). Though there may have been stray collections in 1898, Santosh's title had been extinguished in 1890 as Bhubaneswari died in 1878. The learned District Judge says that the sale to plaintiffs could not have been *bonâ fide*; and his finding is that plaintiffs' purchase was speculative and not *bonâ fide*. I submit that the plaintiffs should have brought Santosh from the category of defendants to that of plaintiff.

Babu Mahendra Nath Roy, in reply. Within seven years of Bhubaneswari's death Kali Kumar's son was born and his annuity was paid; so the question of adverse possession did not arise, and there

(1) (1873) L. R. 9 Q. B. 48, 53, 54. (2) (1868) 3 Ch. Ap. 362.

(3) (1903) I. L. R. 30 Calc 783.

was no payment in charity with consequent adverse possession. Neither in *Board v. Board* (1) nor in this case do the plaintiffs claim under the will. We say that it is not open to Surat Kumari after taking possession under the will to set up adverse possession. Neither in this case nor in *Board v. Board* (1) was the claim under the will. Santosh is here and is represented by a vakil of this Court, Mr. G. Sircar. I submit that the elements necessary to support the plea of estoppel against Santosh are wanting.

Cur. adv. vult.

TEUNON AND SHEEPSHANKS JJ. The suit out of which this appeal arises is a suit between two purchasers. The plaintiffs represent the purchaser from the heir of the property in dispute, and the defendants the purchaser from the sons of a legatee of this property. The original owner was the husband of one Bhubaneswari Debi. After his death and that of her son, Surjya Kumar, she succeeded to a woman's estate in the property. By a will which she executed she recited that her son Kali Kumar was a person of dissolute habits and that it was not desirable that her property should go to him. She accordingly left it to her daughter, Surat Kumari, with a proviso that if male children should be born to Kali Kumar, then on their attaining 25 years the said son or sons should succeed to the whole estate. This will is admittedly invalid, because the testatrix had no interest of which she could dispose by will, and it further contains an ineffectual bequest to unborn grandsons. Under it her daughter Surat Kumari entered into possession and continued in possession until her death. During her lifetime Kali Kumar and, after his birth, his son

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Santosh lived jointly with her, and the provision of the will regarding the payment of an allowance to the son was fulfilled.

The trial Judge held that the will was a collusive one, and that it was also in the nature of a trust. He therefore held that the possession of Surat Kumari was never adverse to Kali Kumar and his son, and that therefore the suit was not barred by limitation. He accordingly decreed the plaintiff's suit. The first Appellate Court, on the other hand, held that the will was not a collusive or colourable document, and that, therefore, the possession of Surat Kumari was adverse to Kali Kumar and his son. He also held that Kali Kumar and his heirs were estopped by conduct from disputing the title of Surat Kumari. He has accordingly dismissed the plaintiff's suit

On second appeal three grounds are argued : *first*, that the possession of Surat Kumari was not adverse to Kali Kumar ; *secondly*, that Surat Kumari and her successors are estopped from disputing the claim of Kali Kumar's son ; and, *thirdly*, that the finding of the lower Appellate Court as regards estoppel against Kali Kumar and his successor is mistaken. On each of these points the appellants are entitled to succeed.

Taking first the question of adverse possession, the finding of the learned Additional Judge that the will was not a collusive or colourable transaction is not in itself sufficient to support a case of adverse possession ; and when the admitted facts are examined, it is clear that the possession of Surat Kumari was not, in fact, adverse to Kali Kumar and Santosh. Neither she nor Kali Kumar appears to have had any idea that the will was not a valid one. She never set up any other title except the will. On the contrary she accepted all its provisions, and regularly

made the payments required to be made to the family of Kali Kumar. These payments took up practically all the income of the property. She lived with Kali Kumar jointly and in amity up to the time of her death, which occurred some 14 years after the birth of his son. It is clear that both she and Kali Kumar accepted the position conferred on them by the will, and that her possession was not adverse to him and his son.

Next as regards estoppel against Surat Kumari and her successors. On this point the case is on all fours with *Board v. Board* (1) and the principle laid down there and in *Rup Chand Ghose v. Sarbessur Chandra Chander* (2), viz., that a person who accepts a position conferred upon him by a will cannot at the same time repudiate so much of the will as conveys an interest to another person, governs this case.

In this case Santosh Kumar was the remainderman under the will, and Surat Kumari was, therefore, by her acceptance of the will, precluded from disputing his title as remainderman. It is true that at the trial he claimed not as the remainderman under the will, but as heir to the property. But that is a matter of pleading which does not affect the facts and their application. We hold accordingly that Surat Kumari and her successor-in-title are estopped from disputing the title of Santosh.

The learned Additional District Judge has held that Kali Kumar and his successors are estopped from disputing the defendant's title by the acquiescence of Kali Kumar in the possession of Surat Kumari under the will. It is no doubt true, as the learned Additional District Judge points out, that Kali Kumar did support Surat Kumari's claim to obtain probate of the will and that he did not make

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any effort to assert his own rights against her. The circumstances, however, which have been already set forth make it clear that the acquiescence does not amount to an estoppel. All that Kali Kumar can be said to have acquiesced in is the will, and according to the provisions of the will Santosh would be entitled to succeed. Santosh, therefore, and his successors-in-title cannot be held to be estopped by any such conduct on the part of Kali Kumar. There is no question of any representation having been made to defendants by Kali Kumar or Santosh on the strength of which the defendants made their purchase. The plaintiffs, therefore, are not concluded by any estoppel.

The result is that the appeal succeeds. The plaintiff's claim will be decreed with costs in all Courts

G. S.

Appeal allowed.

LETTERS PATENT APPEAL.

Before Woodroffe and Chaudhuri JJ.

ANANDA MOHAN SHAHA

v.

ANANDA CHANDRA NAHA.*

Bond—Alteration in good faith, consonant to original intention of the parties—Instrument, whether vitiated thereby.

Where a mortgage was in terms one rupee per mensem on a loan of Rupees 200, and the mortgagee inserted the words "per cent." in the bond while in his possession, thus altering the interest from eight annas per cent. per mensem to one rupee per cent. per mensem; and it was found that there had been no fraud, and that it was the common intention

* Letters Patent Appeal No. 68 of 1915 in Appeal from Appellate Decree No. 4037 of 1913.

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of the parties that interest was to be paid at the rate of one rupee per cent. :—

Held, that an alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument.

APPEAL under section 15 of the Letters Patent by Ananda Mohan Shaha and others, the plaintiffs.

This appeal arose out of a suit upon a mortgage bond for Rs. 200. The plaintiffs claimed the principal and interest at one per cent. per mensem. The defence was that, as the bond had been materially altered by the addition of the word "per cent.," plaintiffs were not entitled to any relief. Babu Hari Jiban Bannerjea, Munsif at Chikandi, by his judgment dated 18th July 1912, decreed the suit in part awarding interest at rupee one per month only. On appeal by the defendant, Babu Biraja Charan Mitra, the Subordinate Judge of Faridpur, by his judgment dated 18th August 1913, affirmed the decision of the Munsif and overruled the cross-objection preferred by the plaintiffs. Thereupon the defendant filed a second appeal in the High Court which was decreed by the Hon'ble Mr. Justice Walmsley on 12th April 1915; and against this decision the plaintiffs preferred the present Letters Patent appeal to the High Court.

The judgment of Walmsley J. was as follows :—

"The defendant borrowed 200 rupees from the plaintiff on mortgage, and executed a bond in which the interest was set out as one rupee per mensem. After execution and registration the plaintiff added the words "per centum," and in his plaint he asked for interest at one rupee per centum per mensem. The lower Courts gave him a decree for the principal with interest at one rupee per mensem, *i.e.*, they overruled the defendant's contention that the alteration completely vitiated the document, but they would not give interest according to the alteration.

The defendant has preferred this appeal, and it is contended on his behalf that the alteration rendered the bond absolutely void.

The learned Subordinate Judge appears to have held that the English rule about alterations in documents should not be applied in this case because it would be harsh to apply it; and that it is not applicable because

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the alteration was of a venial character, and because it was made to bring the document into agreement with the intention of the parties, and because it was made after the bond had been registered.

The learned vakil for the respondent supports the judgment of the lower Appellate Court on the ground that the alteration is not of a material nature, and that it was made to bring the bond into agreement with the intention of the parties, and in spite of the alteration the bond is evidence of the debt and of the creation of a charge upon the property mortgaged. The first question is whether the alteration is of such a nature as to fall within the English rule about alterations of documents. The English cases on the subject are to be found in the note on *Master v. Miller* (1) and the case of *Warrington v. Early* (2) is very useful for the purpose of the present case. There, in a promissory note the original stipulation was for lawful interest; subsequently the words "interest at six per cent. per annum" were added in the corner of the note, and the alteration was held to be "fatal" and a "material alteration of the contract." On the authority of that case I hold that the alteration made by the plaintiff was of such a nature as to render the bond void under the English rule. It is not denied that effect is given to the English rule in this country. So I need not cite the cases bearing on this point.

Next comes the question whether the alteration can be sustained on the ground that it was made in order to bring the document into agreement with the original intention of the parties. The cases of *Cariss v. Tattersall* (3), *London and Provincial Bank v. Roberts* (4), and *In re Howgate and Osborn's contract* (5) are quoted; but an examination of those cases shows that they are quite different from the present one. It cannot be inferred from the document as it stood originally that the interest was to be "per centum," and external evidence to that effect is not admissible. The last contention of the respondent is that the principle adopted in *Ramasamy Kon v. Bhasani Ayer* (6) is applicable, but that argument is disposed of by the remarks made in the Full Bench case of *Christacharlu v. Karibasayya* (7). In this case, also, the plaintiff's suit is founded "on the instrument as altered and on nothing else."

I am of opinion that the decree of the lower appellate Court cannot be sustained. The application of the English doctrine may seem harsh to the plaintiff, but it is his own wrong and foolish act that has brought

(1) (1791) 4 T. R. 320; 2 R. R. 399. (4) (1874) 22 W. R. 402.

(2) (1853) E. & B. 763.

(5) [1902] 1 Ch. 451.

(3) (1841) 2 M. & Gr. 890.

(6) (1866) 3 Mad. H. C. 247.

(7) (1885) I. L. R. 9 Mad. 399, 410.

him into trouble. The only relief he can be allowed is that he should not be made to pay costs to a defendant who has escaped a moral obligation on a technical plea

The appeal is allowed, and the plaintiff's suit is dismissed, but the parties will bear their own costs in all Courts."

Babu Jogesh Chandra Roy and *Babu Asita Ranjan Ghose*, for the appellant. There was no fraudulent intention on the part of the mortgagee to alter the bond. He interpolated the words "per centum" merely to carry out the original intention of the parties and in good faith without the intention of defrauding the mortgagor. These are the findings arrived at by both the Courts below and cannot be challenged here in second appeal. Alteration in good faith does not vitiate the instrument. See *Gour Chandra Das v. Prasanna Kumar Chandra* (1) where it is said that fraud alone will vitiate the instrument.

Refers to *Cariss v. Taltersall* (2).

[WOODROFFE J. There the obligor consented to the alteration and therefore he was estopped.]

See *Dodge v. Pringle* (3) and *In re Howgate v. Osborn* (4). Sections 92 and 93 of the Evidence Act do not prevent the taking of evidence in order to ascertain the state of facts by which the mortgagee was actuated to alter the deed by inserting the words "per centum." In other words, these sections are no bar to the Court taking additional evidence in order to ascertain the original intention of the parties, and to determine the question of fraud, *i.e.*, whether the mortgagee interpolated the words merely to set matters right in good faith, or whether his intention

(1) (1906) I. L. R. 33 Calc. 812, 819; (3) (1860) 29 L. J. Ex. 115.

3 C. J. L. 363.

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(2) (1841) 2 M. & Gr. 890;

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was to vary the terms of the contract in order to defraud the mortgagor. The cases relied upon by Mr. Justice Walmsley in his judgment differ entirely from the present case, inasmuch as in all those cases the question of fraudulent intention on the part of the party who altered the deed was found: *Narayana Pattar v. Viraraghavan Pattar* (1), *Mangal Sen v. Shankar Sahai* (2), *Achhutanand Bhattacharji v. Ram Nath Bhattacharji* (3) and *Surendra Nath Ghose v. King-Emperor* (4).

My next point is that the alteration was made after registration. The mortgage being for Rupees 200 was complete on registration of the deed, and once the mortgage is created an interest in the mortgaged property vests in the mortgagee: and he cannot be divested of this interest by any alteration or interpolation subsequent to the registration of the deed. Of course, the mortgagee may not get any relief in terms of the deed as altered, but his right to the mortgaged property in terms of the deed, as it stood when registered, cannot be impeached or impaired by any subsequent event: see *Ramasamy v. Bhawani* (5), *Christacharlu v. Karibasayya* (6), *The Agricultural Cattle Insurance Co. v. Sir John Foster Fitzgerald* (7), *Doe dem. Beanland and Others v. Hirst* (8) and *Hutchins v. Scott* (9).

Babu Trailakya Nath Ghose, for the respondent. Though the finding is that the alteration is *bona fide* but unauthorised, still the law will apply. The question of good faith and bad faith does not arise as the plaintiff has not come into Court with clean hands.

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| (1) (1899) 1 L. R. 23 Mad. 184, 187. | (5) (1866) 3 Mad. H. C. 247. |
| (2) (1903) 1 L. R. 25 All. 533, 532. | (6) (1885) 1 L. R. 9 Mad. 399. |
| (3) (1913) 18 C. L. J. 354, 353. | (7) (1851) 16 Q. B. 432. |
| (4) (1910) 12 C. L. J. 277. | (8) (1821) 23 R. R. 756. |
| (9) (1837) 46 R. R. 773, 777. | |

The law will apply whether there has been fraud or not, as in the case of promissory notes and other instruments. Here is a material alteration made by interpolating the words "per cent" without the consent of the defendant-respondent. The law was introduced in England in *Pigot's Case*(1). The principle in *Pigot's Case* has been extended to (i) negotiable instruments or promissory notes [*Master v. Miller* (2)], (ii) to bought and sold notes [*Powell v. Divet* (3)], (iii) to guarantee [*Davidson v. Cooper* (4)] and (iv) to cases of alteration by adding a party [*Gardner v. Walsh* (5)]. All these cases are collected in *Suffel v. The Bank of England* (6). In those cases "fraud" is not mentioned: see also *Sutton v. Toomer* (7), *Leonard Warrington v. John Early* (8), *Gogun Chunder Ghose v. Dhuronidhur Mundul* (9).

As to material alteration, it has been held that alteration of the rate of interest is a material alteration: *Oodeychand Boodaji v. Bhaskar Jagonnath* (10). No fraud is mentioned there. Also see *Achhutanand Bhattacharji v. Ram Nath Bhattacharji* (11). In this case there is no reference to fraud either, as an alteration in respect of compound interest vitiated the instrument. According to sections 87 and 89 of the Negotiable Instruments Act (XXVII of 1881) a material alteration in a promissory note vitiates a negotiable instrument without any question of fraud. Now the only question is, does this law apply to a bond? As to the finding that the alteration was made in good

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(1) (1615) 11 Rep. 266.

(6) (1882) 9 Q. B. D. 555, 561.

(2) (1791) 4 T. R. 320; 2 R. R. 399.

(7) (1827) 7 B. & C. 416.

(3) (1812) 15 East 29.

(8) (1853) 2 E. & B. 763.

(4) (1844) 13 M. & W. 343;

(9) (1881) I. L. R. 7 Calc. 616.

67 R. R. 638.

(10) (1881) I. L. R. 6 Bom. 371.

(5) (1855) 24 L. J. Q. B. 285;

(11) (1913) 18 C. L. J. 354, 358.

5 E. & B. 83.

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faith, sections 92 and 93 of the Indian Evidence Act provide against going behind a contract reduced to writing. Therefore, the original intention cannot be proved. Further, there was no issue of fraud and mistake in this case, yet a finding has been arrived at thereon. The decisions referred to by the other side were all cases of alteration by consent and were accepted on the ground of estoppel.

[CHAUDHURI J. It is conceded that your knowledge and consent was not there.]

If the alteration was unauthorized, the instrument would be vitiated: see Pollock on Contract, 3rd Edition, page 62, under heading "Unauthorized Alterations."

WOODROFFE J. This appeal has been heard at great length. The point which is raised is a simple one. The suit was brought on a mortgage bond of Rs. 200. The defence, which has been found to be false, is that money was not borrowed, that the bond was not executed or registered as the plaintiff alleges, but that the defendant with a view to defraud his own creditors got up a sham mortgage and in order that the *benami* character of this transaction should not be discovered, he made it over to the plaintiff who has taken advantage of that fact. Subsequently, it is alleged that there was a dispute between the plaintiff and the defendant about some tin-shed and other matters and the plaintiff then put in force this mortgage against the defendant. The defendant alleges that there was no consideration. It is further alleged that when the mortgage bond was in possession of the plaintiff, the mortgage being in terms one rupee per mensem, the plaintiff fraudulently inserted the words "per cent." in the bond, thus making the interest from eight annas per cent. per mensem to one rupee per cent.

per mensem. The defence of the *benami* character of the document was abandoned; and the learned Judge found that consideration had been received for this document as was evidenced by a previous deposition of the defendant. Thereupon stress was laid upon the alleged alteration in the document. It has been found as a fact that the document has been altered. It has also been found as a fact that there has been no fraud and that the document was not fraudulently altered. It has been found as a fact, too, that it was the intention of the parties, as it seems to me to be obvious upon reading the document, that interest was to be paid at the rate of one rupee per cent. per mensem. Anybody reading this document (rupee one per mensem) could not fail to read it in the sense in which both the Munsif and the Subordinate Judge have done, viz., that interest was to be paid at the rate of one rupee per cent. per mensem. The finding is that this was the agreement between the parties, and in making this alteration effect was given to the common intention of the parties. It has been held as a matter of law, as has been pointed out in the judgment of the Subordinate Judge, that an alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument. That is the rule of law; and applying the facts found to this rule, the finding of the Subordinate Judge disposes of this question.

It is unnecessary, therefore, to consider the other point which has been raised on behalf of the appellant, viz., that apart from this question altogether, there are a number of decisions which show that as soon as a document is registered a charge is created in favour of the plaintiff and the plaintiff is entitled to enforce the charge and no alteration subsequent to the registration of the document can affect the validity of

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the document. A large number of cases has been cited in support of this proposition. It is unnecessary to decide that question because this case is disposed of upon the ground which I have already stated.

In my opinion the judgment and decree of Mr. Justice Walmsley should be set aside. I accordingly set aside the judgment and decree of Mr. Justice Walmsley and restore the judgment and decree of the Subordinate Judge.

The appellants will be entitled to their costs of this appeal from the respondent.

CHAUDHURI J. I agree.

G. S.

Appeal allowed.

LETTERS PATENT APPEAL.

Before Sanderson C.J. and Mookerjee J.

KRISHNA CHARAN BARMAN

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Penalty—Interest, exorbitant rate of—Inference by Court—Court's power to reduce rate of interest—Mortgage—Release of one joint mortgagor, effect of—Contract Act (IX of 1872), ss. 44, 74.

It is competent to a Court to grant relief whenever the stipulation for payment of interest at a specified rate appears to the Court to be a stipulation of way of penalty.

What constitutes a stipulation by way of penalty must be determined in each individual case upon its own special circumstances.

* Letters Patent Appeal No. 40 of 1914 in Appeal from Appellate Decree No. 56 of 1911.

Webster v. Bosanquet (1), *Khagaram Das v. Ramsankar Das Pramanik* (2), *Bouwang Raja Chellaphroo Choudhuri v. Banga Behari Sen* (3), *Abdul Majeed v. Khirode Chandra Pal* (4), and *Gopeshwar Saha v. Jadav Chandra Chanda* (5) referred to.

Per SANDERSON C. J. The release of one of several joint mortgagors with no express reservation of the mortgagee's remedy against the other mortgagors, does not *ipso facto* release the other mortgagors.

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LETTERS PATENT APPEAL by Krishna Charan Barman and two others, some of the defendants.

This was a suit on a mortgage bond dated the 21st December, 1897. The bond was executed by six persons in favour of the predecessor-in-interest of the plaintiffs and secured the repayment of a sum of Rs. 200 with interest at the rate of one anna in the rupee per month and provided that the mortgagors would be jointly and severally liable. Of the six original debtors two were dead at the date of the institution of the suit in January, 1909, and the representatives of those two and the four survivors were made defendants. Their case was that, though the bond was a joint one, yet there was a contemporaneous oral agreement with the mortgagee that each mortgagor should be separately liable for the sum advanced to him and the interest accruing due thereon, and that on the payment by any one of them of the amount due on his share, he and the property mortgaged by him would be released from all further liability. They further pleaded that such of the debtors had at different times paid the amount due from them and had thereupon secured their discharge.

In the plaint certain payments were set out as credited to interest and the claim was for Rs. 1,419-8. The Court of first instance found that other payments

(1) [1912] A. C. 394.

(3) (1915) 20 C. W. N. 408.

(2) (1914) I. L. R. 42 Calc. 652.

(4) (1914) I. L. R. 42 Calc. 690

(5) (1915) I. L. R. 43 Calc. 632.

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had been made and that one of the debtors had in fact secured his discharge and the release of the property mortgaged by him. On these findings, the Subordinate Judge decreed the suit for Rs. 1,307 against the five remaining mortgagors or their representatives-in-interest. On appeal, the District Judge held that the mortgage had been split up and that the bargain was unconscionable, and acting under section 16 (2) (b) of the Contract Act, he reduced the rate of interest to 15 per cent., that being in his opinion the reasonable rate in the locality on secured loans. An account being taken on this footing, it was found that each of the mortgagors had paid sums in excess of what was justly due, and the plaintiffs' suit was, therefore, dismissed.

The second appeal to the High Court by the plaintiffs was heard by Teunon J. singly. The claim was limited to Rs. 774-13-7. Their contentions were: (i) that the defendants having admitted the voluntary execution of the bond and having pleaded no circumstances which would bring the case within the scope of section 16 (2) (b) of the Contract Act, the District Judge was in error in reducing the rate of interest; and (ii) that evidence of any contemporaneous or subsequent oral agreement modifying the terms of the registered mortgage bond or releasing the properties mortgaged from the liability thereunder was inadmissible. Teunon J. upheld both these contentions, finding that no question of undue influence was raised in the first Court and that the defendants were in urgent need of money, and the appeal was decreed. In view, however, of the exorbitant rate of interest on the bond and on the facts of the case, Teunon J. directed that no interest would run after the date specified for redemption, if the defendants, who continued to be liable, failed to repay within a month of the date of judgment of

the High Court, but that the properties not released would be sold. He also directed that the plaintiffs would pay their own costs throughout and that the released defendants would have their costs throughout with interest at 6 per cent. from the plaintiffs.

Three of the defendants, *viz.*, defendant No. 1, the heir of defendant No. 3 and defendant No. 7, thereupon preferred an appeal against the judgment of Teunon J. under s. 15 of the Letters Patent.

Babu Manmathanath Mukherjee (with him *Babu Satindranath Mukherjee*), for the appellants. The authorities under section 92 of the Evidence Act are conflicting. If the mortgagee can dominate the will of the mortgagor, and the Court finds a high rate of interest, it can reduce it: *Bouwang Raja Chellaphroo Chowdhuri v. Banga Behari Sen* (1), *Kali Prosonno Bhattacharjee v. Protap Singh Pathar* (2), *Kamini Sundari Chaodhrani v. Kali Prossunno Ghose* (3), *Abdul Majeed v. Khirode Chandra Pal* (4), *Khagaram Das v. Ramsankar Das Pramanik* (5), and *A. Muthukrishna Iyer v. Sankaralingam Pillai* (6). See also *Poma Dongra v. Gillespie* (7), *Mothoormohun Roy v. Soorendro Narain Deb* (8), and *Kali Nath Sen v. Trailokhya Nath Roy* (9).

As regards the splitting up of joint security, see *Peria Karuppan v. Velayutham Chetti* (10).

Babu Birajmohan Majumdar, on behalf of the minor respondent, informed the Court that his interest was the same as that of the appellants.

Babu Gobinda Chandra Dey Ray, for the principal

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(2) (1912) 17 C. L. J. 221.

(3) (1885) I. L. R. 12 Calc. 225.

(4) (1914) I. L. R. 42 Calc. 690.

(5) (1914) I. L. R. 42 Calc. 652.

(6) (1912) I. L. R. 36 Mad. 229.

(7) (1907) I. L. R. 31 Bom. 348.

(8) (1875) I. L. R. 1 Calc. 108.

(9) (1899) I. L. R. 26 Calc. 315.

(10) (1906) I. L. R. 29 Mad. 302.

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respondents, was called upon to argue only on the question of the rate of interest. In all reported cases in this Court we find there were alternative stipulations by way of penalty. In such cases you can consider the question of undue influence. In the present case undue influence was not pleaded even, and there was no issue or evidence on the point. There are several reported cases where interest higher than in this case has been allowed. The parties are the best judges and not the Court.

[MOOKERJEE J. Why have you given up half the claim?]

Because the court-fee was not forthcoming.

[MOOKERJEE J. Are you entitled to do so?]

That is done every day. I can give up part of the claim. You have to decide as to the validity of the contract.

[SANDERSON C.J. But does not the giving up rather show that you felt the weakness of your case?]

It depends on the state of mind. I am not prepared to say anything. A portion of claim has often been relinquished.

[MOOKERJEE J. That has been condemned. Neither did you save much by abandoning part, I think?]

For ought I know, there might have been a mistake.

[SANDERSON C.J. We shall not decide the case on this point alone.]

Very well. I then contend that the case does not fall under section 74 of the Contract Act. All the old cases are in my favour. *Khagaram Das v. Ram-sankar Das Pramanik* (1) is distinguishable.

[MOOKERJEE J. That decision was not confined to the facts of the case.]

The word "penalty" is nowhere defined.

[MOOKERJEE J. The greater reason that Courts will give relief.]

You cannot lay down a hard and fast rule. The present case is a very simple one.

[SANDERSON C.J. Teunon J. does not deal with the point at all.]

[MOOKERJEE J. Teunon J.'s judgment was passed before the date of the case cited last by you (1) and the other case in the same volume.]

SANDERSON C.J. This case, in my judgment, raises a question of considerable importance and we are much indebted to the three learned vakils, who have argued the question before us, for their assistance.

It appears that so long ago as 1897 the mortgage in question was executed by six individuals, some of whom are defendants, and the others are now dead and their representatives are the other defendants in this case.

The mortgage was to secure a loan of Rs. 200, and it contained a provision that the loan should be repaid within two months with interest at the rate of one anna in the rupee per mensem, and in case of default the interest was to run at that rate till payment. Each of the six borrowers mortgaged a *hal* of land to secure the loan. Certain payments were made by some of these six individuals so that the result was that within a little more than six years from the date of the loan the lender received Rs. 463, that is to say, the whole of his principal Rs. 200 and Rs. 263 by way of interest, which is considerably more than 100 per cent. He postponed bringing his action until 1909, and then

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the mortgagee sued for Rs. 1,419-8 annas, which he alleged was the amount owing to him upon the mortgage, after deducting the payments which had been admittedly made.

The Court of first instance gave the plaintiff a decree, but not for the full amount of his claim, but for Rs. 1,307. Then the defendants appealed to the District Judge, who dismissed the suit altogether. He came to the conclusion that a collateral verbal agreement had been made between the plaintiff on the one hand and the defendants on the other, whereby the plaintiff gave the defendants to understand that he would hold each of them liable for his own share only, and that when he accepted the various payments which were made he verbally agreed to that effect. The learned judge after reviewing the evidence carefully came to the conclusion that that agreement had in fact been made, and that consequently the original agreement which was contained in the mortgage bond was varied, and that having regard to that varied agreement the defendants had individually discharged their liabilities, and that consequently there was nothing owing to the plaintiff under the mortgage bond and therefore he dismissed the suit altogether. The plaintiff appealed to this Court, and Mr. Justice Teunon upon that point held that evidence of the verbal agreement upon which the District Judge had relied was not admissible having regard to section 92 of the Evidence Act; and in my judgment the learned Judge was right in coming to that decision. I think that the District Judge ought not to have admitted evidence of the verbal agreement, because it did in material respects vary the contract which was contained in the mortgage bond, and I may point out one respect in which it varied the mortgage bond, that is to say, the mortgage bond by its terms provided that each one of

the mortgagees was liable for the whole amount of the mortgage, namely, Rs. 200 and interest; but the alleged verbal agreement provided that each individual who had executed the mortgage bond was liable for one-sixth of the Rs. 200 only; and, therefore, it is obvious that in that material respect, namely, in the provision for the repayment of the loan, the contract contained in the mortgage bond was varied by the alleged verbal agreement, and consequently to my mind the learned Judge was quite right in saying that that evidence ought not to have been admitted to prove the alleged verbal agreement, having regard to section 92 of the Evidence Act.

It was then argued by the learned vakil for the appellant that even if the evidence as to the alleged verbal agreement could not be admitted to show the agreement, he could prove that he had made certain payments and those payments had been accepted by the plaintiff in full satisfaction of the claim. But that argument cannot be maintained, because, when one examines the facts, one cannot say that the plaintiff accepted these payments in full satisfaction of the contract, for he was at the same moment insisting on his right to be paid not only the principal, but interest at 75 per cent., and the payments in fact did not cover the principal and the interest at 75 per cent., but only covered the principal and interest at 15 per cent. Therefore the learned Judge was right in allowing the appeal upon that point.

Then comes the important question of the power of the District Judge to interfere with the agreement which was made between the parties as to the rate of interest, namely, 75 per cent.

Now, I do not intend to decide in this case that the circumstances amounted to undue influence within the meaning of section 16 of the Contract Act. I do not

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think it necessary for the purpose of my judgment to come to any conclusion upon that point, and I do not express any opinion upon it. But I do think that this case comes within section 74 of the Indian Contract Act, interpreted as it has been by the decision of this High Court, with which decision I have no reason to quarrel. Section 74 provides "when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for." Now, in this case the contract has been broken. The question is whether it contains any stipulation by way of *penalty*. If it does, then the party who is entitled to sue for the breach of the contract is entitled to recover nothing more than reasonable compensation, and what is reasonable compensation must be settled by the tribunal before which the case comes. There is a provision in the section that "reasonable compensation must not exceed the amount so named, or, as the case may be, the penalty stipulated for." It is obvious to my mind, as I have said, that what is reasonable compensation must be settled by the tribunal trying the case. In arriving at a conclusion as to whether this contract contains a stipulation by way of penalty, I am assisted by the decision of *Khagaram Das v. Ram Sankar Das Pramanik* (1), in which my learned brother Mr. Justice Mookerjee gave a judgment which was concurred in by my learned brother Mr. Justice Beachcroft, and it is therein stated: "It is not of much

moment to consider whether the Court can grant such relief in the exercise of its equitable jurisdiction or under section 74 of the Indian Contract Act as amended in 1899. It is sufficient to observe that although the section was originally framed to deal with the doctrine of penalty and liquidated damages as understood in the law of England, it is in its present form comprehensive enough to include the type of case now before us, because it covers all cases where the contract contains "any stipulation by way of penalty." The question consequently reduces in any concrete case to this, does the contract contain a stipulation by way of penalty? In the solution of this question, the observations of Lord Mersey in *Webster v. Bosanquet* (1) may be usefully borne in mind. The test is, was the agreement to pay the damages for the breach of covenant or contract unconscionable and extravagant, such as no Court ought to allow to be entered into? Now, when one is considering whether the agreement to pay interest at 75 per cent. is a stipulation by way of penalty, one has to take into consideration all the facts of the case. In this case it is found that the loan was intended as a merely temporary loan intended to be repaid in two months. We know it had to be raised by the defendants who were men in poor circumstances—all of them, with one possible exception, were ignorant men—for the purpose of providing *begar* transport coolies for the Lushai Expedition. Rupees 200 was the total amount of loan, and a considerable amount of land, according to the finding of the District Judge, was mortgaged to secure this loan. As I read his judgment the land was considerably in excess of the principal sum of Rs. 200 or any possible interest which could become recoverable within the space of two months or within

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any reasonable time; and, therefore, when I consider all these facts, can I say that the borrowers under those circumstances having agreed to pay interest at 75 per cent. were doing anything but agreeing to pay a *penalty*? In my opinion there can only be one answer. The District Judge said: "The plaintiff's claim is certainly one that shocks the conscience." The learned Judge of the High Court said that in his view the rate of interest was "*exorbitant*," and in that view he did not allow the plaintiff any costs.

In my opinion, under the circumstances of this case, the agreement to pay interest at 75 per cent. was a stipulation by way of penalty. But I wish to make it quite clear that I am deciding that this agreement is a stipulation by way of penalty, having regard to the circumstances of this case and this case only, because it may well be that in other cases 75 per cent. is a perfectly proper rate, or at any rate it may not be a stipulation by way of penalty.

As I have said, I think under the circumstances of this case the insertion of the provision as to the rate of interest was a stipulation by way of penalty. Therefore, we have to consider what is reasonable compensation within the meaning of section 74.

I think that the rate of interest which was allowed by the District Judge at 15 per cent. ought not to be disturbed. I should require further information to satisfy me that the decision of the gentleman who was acting as the District Judge sitting in the district and who knew the local conditions and heard all the evidence should be interfered with. I think he was eminently the right person to decide such a question. I therefore confirm his judgment that 15 per cent. would be the reasonable compensation. The result of that will be that a further account will have to be taken, unless the parties can agree as to the

amount. For this reason, as I understand, the learned Judge of the first Appellate Court directed an account to be taken upon the basis that there was a verbal agreement, each individual mortgagor being liable to pay one-sixth of the principal and interest thereon; but I have come to the conclusion that evidence as to that verbal agreement ought not to be admitted and the only contract between the parties is the written mortgage bond, and the defendants are liable to pay the full amount of the principal which is Rs. 200 and interest at the rate of 15 per cent. down to the institution of the suit. It may be that what the parties have already paid covers the amount which they are liable to pay on that basis; on the other hand, it may be that what the parties have already paid does not cover the amount for which they are liable on that basis. It will depend upon the result of the account as to what will be the final form of the decree. The decree will be that the plaintiff is entitled to recover against the defendants jointly and severally five-sixths of the principal money, namely, Rs. 200 and interest thereon at the rate of 15 per cent. per annum down to the date of the suit and from the date of the suit at 6 per cent. per annum until realization. The account will have to be taken, and if it turns out that the amount which the defendants have already paid was sufficient to cover the amount due upon the decree upon that basis, then the suit will be dismissed. On the other hand, if it turns out that the amount already paid is not sufficient, then there will be a decree in favour of the plaintiff for the balance. The final decree will be drawn up by the Bench clerk upon this basis, who no doubt will have the assistance of the learned vakeels on both sides.

There is just one other matter which I ought to

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have mentioned. It was argued during the course of the case that inasmuch as the plaintiff had released one of the mortgagors, and had not at the same time expressly reserved his remedies against the other mortgagors, that in itself would release the other mortgagors. At one time I was impressed by that argument because it coincided with the view which is held in England with regard to such a position as that, and if this matter had to be decided by the law as it stands in England at the present moment, that might have raised considerable difficulty in the way of the plaintiff; but my attention having been drawn to section 44 of the Contract Act which apparently was expressly inserted for the purpose of modifying the law as it stands in England, I do not think that point is a good one.

As regards costs, I think that the appellants in this Court should have the costs of this appeal. With regard to the proceedings before Mr. Justice Teunon, each party will pay his own costs. With regard to the proceedings before the first Appellate Court and the Court of first instance, they will depend upon the result of the account, and the costs will be in proportion to the success of each party, and if the suit on such account being taken be dismissed, it will be dismissed with costs in those Courts.

Liberty to apply.

MOOKERJEE J. I agree that the judgment of Mr. Justice Teunon now under appeal cannot be supported.

The plaintiffs respondents instituted this suit on the 28th January, 1909, to enforce a mortgage granted by six persons in favour of their predecessor on the 21st December, 1897, to secure an advance of Rs. 200 on interest at the rate of 75 per cent. per annum.

The plaint stated that Rs. 443 had been paid towards the satisfaction of the debt and that Rs. 1,419-8 was still due. The plaintiffs, accordingly, prayed that the mortgaged premises might be sold for realisation of this sum.

The Court of first instance found that the plaintiffs had released one of the six mortgagors on receipt of a proportionate share of the mortgage-money together with interest, but that they had not given full credit for the payments made by the other mortgagors. The result was that a decree was made in favour of the plaintiff for Rs. 1,307 to be realised by sale of that portion of the mortgaged premises which had not been released. The defendant appealed against this decree.

The District Judge held, in the first place, that there was evidence to show that the mortgage contract had been split up by agreement of all parties concerned and that the mortgagee had undertaken to receive from each of the mortgagors a proportionate amount of the mortgage money and to release the corresponding share of the mortgaged properties. He held, in the second place, that interest was not justly recoverable at the rate of 75 per cent. per annum and that interest should be allowed only at the reduced rate of 15 per cent. per annum. Accounts were then taken on the basis described, and it transpired that the several mortgagors had paid up their respective shares of the mortgage money with interest. Consequently, the ultimate decree of the District Judge was that the suit be dismissed.

The plaintiffs thereupon appealed to this Court and valued their appeal at Rs. 774-13-7, although a decree had been made in their favour by the trial Court for a much larger sum. In support of the appeal, which was heard by Mr. Justice Teunon, the plaintiffs argued,

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first, that oral evidence was not admissible, in view of the provisions of section 92 of the Indian Evidence Act, to prove that the mortgage contract had been varied in the manner alleged, and, *secondly*, that interest was recoverable at the contract rate of 75 per cent. per annum. Mr. Justice Teunon accepted these contentions and made a decree in favour of the plaintiffs, limited to the amount claimed in the appeal. He came to the conclusion, however, that the rate of interest specified in the bond was exorbitant and he consequently deprived the successful plaintiffs of their costs, as also of interest on the decretal sum after the date specified for redemption.

On the present appeal, which has been preferred under clause 15 of the Letters Patent, two objections have been urged on behalf of the defendants, namely, *first*, that interest is not payable at the rate specified in the bond, because the stipulation for payment of interest must be deemed a stipulation by way of penalty within the meaning of section 74 of the Indian Contract Act, and *secondly*, that whatever decree, if any, is awarded to the plaintiffs, it should be a decree, not jointly against the defendants for the entire sum found due, but severally against each of the mortgagors for a specified proportionate sum.

As regards the first contention, I am of opinion that the appellants have established their position. I base my conclusion on the ground that, in the circumstances of this case, the stipulation for payment of interest at 75 per cent. per annum was a stipulation by way of *penalty* within the meaning of section 74 of the Indian Contract Act. The District Judge has found, and his finding must be deemed conclusive by this Court, that the borrowers were ignorant Cachari cultivators, that they had been called upon to supply without remuneration transport coolies for the

Lushai Expedition which they were bound by the Regulation to supply, and that for the wages of the coolies they had to resort to a money-lender. The plaintiffs advanced the money, and notwithstanding the fact that ample security was furnished by the borrower, they charged interest at the rate of 75 per cent. per annum, although that was the rate of interest usual only in cases of unsecured loans. The District Judge has held, in these circumstances, that the covenant for payment of interest at such a high rate as 75 per cent. per annum was a stipulation by way of penalty and that award of interest at the rate of 15 per cent. per annum would meet the justice of the case.

On behalf of the plaintiffs respondents, the position has been maintained that the stipulation was not by way of penalty, inasmuch as the bond did not contain alternative provisions for payment of interest in different contingencies. The contention of the respondents in substance is that a stipulation for payment of interest cannot be deemed a stipulation by way of penalty, if the bond provides for payment of interest at one rate only, howsoever high and exorbitant that rate may be, and on this ground the decision in *Khagaram Das v. Ramsunkar Das Pramanik* (1) has been sought to be distinguished. No doubt in that case the bond provided for payment of interest at alternative rates in varying circumstances; that, however, was not the reason for the conclusion adopted in that case. Upon a review of the earlier decisions in this Court and in the other High Courts, the principle was adopted that a Court is competent to grant relief whenever the rate of interest appears to the Court to be penal, although the provision for payment of interest mentions one rate only. This doctrine was recently applied in the case of *Bouwang Raja Ghellaphroo v. Banga Behari*

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Sen (1). Reference has been made in the course of the argument to another decision [*Abdul Majeed v. Khirode Chandra Pal* (2)] which also apparently supports the contention of the appellants. With regard to that decision, however, I wish to guard myself against a possible inference that I accept all the propositions formulated in the judgment in that case; it appears to me that some of the statements therein may be open to just criticism. But I adhere to the view which, after much deliberation and with the concurrence of Mr. Justice Beachcroft, I took in the case of *Khagaram Das v. Ramsankar Das Pramanik* (1), and followed in *Bouwang Raja Chellaphroo v. Banga Behari Sen* (1) with the concurrence of Mr. Justice N. R. Chatterjea, and in *Gopeshwar Saha v. Jadav Chandra Chanda* (3), with the concurrence of Mr. Justice Newbould, namely, that it is competent to a Court to grant relief whenever the stipulation for payment of interest at a specified rate appears to the court to be a stipulation by way of penalty.

The respondents have invited the Court to define what may be deemed a stipulation by way of penalty. I do not think we should accede to this request. It would clearly be wrong for the Court to lay down a rigid definition and thereby to crystallise the law, when the Legislature, for the best of reasons, has not defined that expression. What constitutes a stipulation by way of penalty must be determined in each individual case upon its own special circumstances, and, in the circumstances of this case, I hold without hesitation that the stipulation for payment of interest at the rate of 75 per cent. per annum was a stipulation by

(1) (1915) 20 C. W. N. 408 ;
22 C. L. J. 311.

(2) (1914) I. L. R. 42 Calc. 690.
(3) (1915) I. L. R. 43 Calc. 632.

way of penalty. If, consequently, the agreement for payment of interest is not enforceable, as I hold it is not, the plaintiffs are entirely in the hands of the Court, and I accept the view of the District Judge that 15 per cent. per annum is the proper rate in this case. The first point must consequently succeed.

As regards the second contention, it is clear that, in view of the provisions of section 92 of the Indian Evidence Act, oral evidence was not admissible to prove the alleged agreement between the mortgagees and mortgagors, whereby it is said the mortgage contract was split up. The essence of the matter is that the entire mortgage contract must, under section 59 of the Transfer of Property Act, be comprised in one or more written and registered instruments. We have here a written and registered instrument by which the original security was granted. Under the contract embodied there, the mortgagees are entitled to hold the mortgagors jointly and severally liable for the entire mortgage debt. A variation in that contract to the effect that each mortgagor is liable only in respect of a proportionate share of the debt could be effected only by another written and registered instrument, so that the entire mortgage contract would thereafter be found in two instead of in one document [*cf.* the decision of the Full Bench in *Lalit Mohan Ghosh v. Gopali Chuck Coal Co.* (1)]. If we were to accede to the contention of the appellant, the statutory provisions of section 92 of the Indian Evidence Act could be easily evaded and completely nullified. When the difficulty of the situation was realized by the appellants, the contention was, as a last resort, faintly put forward that the defendants might invoke the assistance of the doctrine that as one of the mortgagors has been released, the entire mortgage contract has been thereby

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split up. But it is plain that the appellants are not entitled to rely on this position, which is inconsistent with their original case. Their primary case was that the mortgage contract had been split up by agreement of all the parties concerned, namely, the mortgagees and the mortgagors. Oral evidence, it has been held, is not admissible in proof of the alleged agreement. The defendant cannot now turn round and set up the inconsistent case that the mortgage contract has been split up, because one of the mortgagors has been released by the mortgagees without the consent of the other mortgagors. In this view, it is unnecessary to consider the application of the principle enunciated in *Hakim Lal v. Ram Lal* (1) and *Debendra Nath Sen v. Abdul Samed Seraji* (2). Consequently, the decree in this case must be a joint decree in favour of the plaintiffs for such sum, if any, as may be found due upon the mortgage accounts against all the defendants (other than the mortgagor who has been released).

S. M.

Appeal allowed.

(1) (1907) 6 C. L. J. 46.

(2) (1909) 10 C. L. J. 150.

APPELLATE CIVIL.

Before D. Chatterjee and Newbould J.J.

JAGAT BIJOY BHATTACHARJEE

v

TOMIJUDDI HOWLADAR.*

1916

May 18.

Will—Construction—Bequest by Hindu testator to widow, daughter, and daughter's daughter—Succession Act (X of 1865), s. 111.

Where a testator intended that his wife, daughter and daughter's daughter should each have an absolute interest in the property, and so long as anybody descended from himself was in existence, his brother's son or the latter's descendants should have no interest in the property and where the provisions of his will ran thus—"If my wife die before, my daughter Gangamoni Debya shall get the property etc." :—

Held, that under the provisions of s. 111 of the Succession Act the daughter takes only a life interest.

Lallu v. Jagmohan (1), *Mahendra Lal v. Rakhal Das* (2), *Tripurari Pal v. Jagat Tarini Dasi* (3), *Sures Chandra Palit v. Lalit Mohan Dutta Choudhuri* (4), referred to.

SECOND APPEAL by Jagat Bijoy Bhattacharjee and Sarat Bijoy Bhattacharjee, the plaintiffs.

The disputed properties formed the *brahmottar* of one Iswar Chandra Bhattacharjee who died, leaving Rukmini Debia a widow, Gangamoni a daughter, Soudamini a daughter's daughter (*i.e.*, Gangamoni's daughter) and Gouri Bijoy a deceased brother's son him surviving. Rukmini died in 1297 B. S. (corresponding with the years 1890 and 1891) leaving Ganga-

* Appeal from Appellate Decree, No. 3597 of 1914, against the decree of Jadav Chandra Bhattacharjee, Subordinate Judge of Barisal, dated Aug. 31, 1914, reversing the decree of Kunja Behary Ray, Munsif of Barisal, dated Aug. 4, 1913.

(1) (1896) I. L. R. 22 Bom. 409. (3) (1912) I. L. R. 40 Calc. 274.
(2) (1912) 17 C. L. J. 630. (4) (1915) 20 C. W. N. 463.

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moni and Soudamini her surviving. Soudamini died in 1310 B. S. corresponding with the years 1903 and 1904, leaving Jiban Kumar an only son her surviving. Gangamoni died in Bysack 1313 B. S. corresponding with the years 1906 and 1907. By a will dated the 14th Chaitra 1279 B. S. corresponding with the 26th March 1872 Iswar gave an absolute interest in the properties in suit to Rukmini, and the will contained the following provision: "If my wife should die before, then my daughter Gangamoni Debya shall get the said property, etc." The plaintiffs who are the sons of Gouri Bijoy in 1908 brought a suit for recovery of possession of the properties in suit against Jiban Kumar, who subsequently compromised the said suit. When the plaintiffs by virtue of this compromise attempted to recover possession of the said properties, the defendants resisted on the ground that they had obtained a "*osat taluk patta*" from Gangamoni. The plaintiffs then filed a suit for recovery of possession of the said properties.

The original Court decreed the suit, holding that by Iswar's will an absolute interest was vested in Rukmini; that if the latter had died during the testator's lifetime, Gangamoni would then have had an absolute interest after Rukmini's death; that as Gangamoni had only a life interest in the property as a Hindu widow, she could not give a permanent lease in the absence of proof of legal necessity.

On appeal, the lower Appellate Court reversed the decision of the Court of first instance on the points stated above. From this decision the plaintiffs appealed to the High Court.

Babu Sarat Chandra Roy Chaudhury (with him *Babu Bhupendra Nath Guha* and *Babu Nukleswar Mookerjee*), for the appellants, submitted that s. 111

of the Indian Succession Act applied to the facts of the present case, and under the provisions of that section the legacy to Gangamoni could not take effect, as the event, *i.e.*, the death of Rukmini, did not take place during the lifetime of her husband when the legacy became payable and distributable: *Mahendra Lal v. Rakhal Das* (1) and *Norendra v. Kamalbasini* (2). He contended that there being an absolute gift in favour of the widow, there was nothing left for the daughter Gangamoni to take; the provisions of the will not only authorised the widow to alienate the estate, but also directed that she was to enjoy the property as absolute owner: *Amarendra Nath Bose v. Shuradhani Dasi* (3), *Gobinda Chunder Gupta v. Benode Chunder Dutt* (4), *Sures Chandra Palit v. Lalit Mohan Dutta Choudhuri* (5), *Tripurari Pal v. Jagat Tarini Dasi* (6). The provisions of the will were different in *Hara Kumari Dasi v. Mohim Chandra Sarkar* (7), and *Kandarpa Nath Ghose v. Jogendra Nath Bose* (8).

Babu Surendra Nath Guha, for the defendants, contended that the s. 111 of the Succession Act did not apply. There was a distinction between a case in which the event was uncertain and one in which it was certain though future. Death is a certain event though future. Section 106 of the Succession Act would apply: *Lallu v. Jagmohan* (9).

Babu Sarat Chandra Roy Chowdhury, in reply.

CHATTERJEE AND NEWBOULD JJ. There can be no doubt that the testator in this case intended that his wife and daughter and daughter's daughter should

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(2) (1896) I. L. R. 23 Calc. 563.

(6) (1912) I. L. R. 40 Calc. 274.

(3) (1909) 14 C. W. N. 458.

(7) (1908) 7 C. L. J. 540.

(4) (1906) 12 C. W. N. 44.

(8) (1910) 12 C. L. J. 391.

(9) (1896) I. L. R. 22 Bom. 409.

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each have an absolute interest in the property, and that, as far as possible, so long as anybody descended from himself was in existence, Gouribijoy or his descendants should have no interest in the property.

There is, however, a provision of law, namely, section 111 of the Succession Act, which has been applied to the wills of Hindus and which seems to be contravened in giving full force to the intention of the testator. That section provides: "Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect unless such event happens before the period when the fund bequeathed is payable or distributable." Now, if this section applies, the respondent is out of Court.

The respondent, however, contends that this section does not apply, because it speaks of the happening of a specified uncertain event, and death is a certain event to which every human being is subject. So far, that is a correct proposition of law; but what is uncertain is the period when death comes. The provision in the will is: "If my wife die before, my daughter Gangamoni Debya shall get the said property etc." There is, therefore, an "if" in the will, and there is an "if" in section 111. Whether the wife would die in the lifetime of the testator or after him, is an uncertain event, and the daughter is allowed the interest that is given to her by the will only in case the wife die in the lifetime of the testator. That is an uncertain event. These circumstances seem to point to the application of section 111; and if section 111 applies, the respondent has no case.

Reference has been made by the learned vakil for the respondent to the case of *Lallu v. Jagmohan* (1), in which a somewhat similar provision in a Hindu

will was interpreted. Their Lordships, however, in construing the will held that the interest given to the wife was a life interest. That being so, it would not contravene section 111 which was not at all referred to before their Lordships. Then there are cases in our Court which do seem to have laid down a somewhat contrary proposition. We may refer to the cases of *Mahendra Lal v. Rakhal Das* (1), *Tripurari Pal v. Jagat Tarini Dasi* (2) and *Sures Chandra Palit v. Lalit Mohan Dutt Choudhuri* (3). These cases support the contention of the appellant that this is a case which is within the mischief of section 111 of the Succession Act.

It may, however, be stated in this case that the event in respect of which the testator had a fear, that is the survivor of any of his descendants being at the mercy of his nephew and his heirs, has no application; because all of them have died, except Soudamini's son, who has compromised with the plaintiff. That being so, there is no conflict in the result with the intentions of the testator.

In this view of the case we think that the judgment of the learned Subordinate Judge should be set aside, and that of the Munsif restored with costs.

L. R.

Appeal allowed.

(1) (1912) 17 C. L. J. 630.

(2) (1912) I. L. R. 40 Cal. 274.

(3) (1915) 20 C. W. N. 463.

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PRIVY COUNCIL.

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June 22 ;
July 17.

BANGA CHANDRA DHUR BISWAS

v.

JAGAT KISHORE ACHARJYA CHOWDHURI
(AND 5 OTHER APPEALS CONSOLIDATED).

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu Law—Alienation—Onus of proof of legal necessity—Recitals in deeds as to necessity—Evidence of representation to purchasers—Value of recital after lapse of time when actual proof of enquiry has become impossible—Attestation of deed, effect of, as evidence of knowledge of contents, or of consent by reversioner—Unexplained delay in prosecution of appeals—Costs disallowed if delay due to appellants.

In a suit for property alienated by a Hindu widow in possession of her husband's estate, the burden of proving legal necessity for the alienations lies on the purchasers.

Maheshwar Baksh Singh v. Ratan Singh (1) followed.

Recitals in deeds cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. They can only be evidence as between the parties to the conveyances and those who claim under them. After a long period, however, has elapsed between the alienation and the suit to set it aside when all those who could have given evidence on the relevant points have grown old or have passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance and cannot lightly be set aside. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible the recital coupled with such circumstances would be sufficient evidence to support the deed.

Where the total value of the estate was small and there were expenses like the husband's *shradh* and any debts against his estate, which had to be

³ *Present* : THE LORD CHANCELLOR (LORD BUCKMASTER), LORD ATKINSON AND SIR JOHN EDGE.

(1) (1896) I. L. R. 23 Calc. 766 ; L. R. 23 I. A. 57.

paid, besides the necessity for the maintenance of the widows which need not be measured merely by a sufficient sum to support existence, the periods at which, between 1848 and 1865, the properties were sold the small sums for which the sales were made, and the disposition of the property piece by piece with fair regularity for 16 years all went to support the view that the widows found themselves unable to provide sufficient maintenance out of the income of the estate, until their means came to an end in 1865, and the circumstances were such as would be sufficient to justify the assumption that proper enquiry would have disclosed that necessity existed. There was only the one fund for payment and if money was needed to pay debts, the amount of money available for maintenance would to that extent be reduced, and if the debts had been paid by the widows out of borrowed money it would make no difference whether the necessity to pay debts, or to maintain themselves was stated in the recitals as reason for the sale.

Attestation of a deed proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed, nor affect him with notice of its provisions. If it had been quite impossible for either of the widows lawfully to dispose of any interest in the properties, and it was shown that the witness knew the nature of the deed, more value might be given to his attestation, but by itself it would neither create an estoppel nor imply consent.

Hari Kishen Bhagat v. Kashi Pershal Singh (1) referred to.

Comments were made by their Lordships on the delay that had occurred between the decrees of the High Court in August 1909 and the setting down of the appeals for hearing in April 1916, for which no sufficient reason appeared. Unexplained, it constituted a grave reproach to the administration of justice. All the respondents had been unjustly attacked in the lawful possession of property, and for seven years had been subject to the anxiety and distress of knowing that the judgment of the High Court in their favour was subject to the inevitable uncertainties of the law. Their Lordships said that had the appeals succeeded they would have refused the appellants any costs of the appeals unless they could have cleared themselves of the imputation of having needlessly protracted the proceedings; and that course would be taken in similar cases in the future, if occasion arose.

APPEAL No. 16 of 1914 consisting of six consolidated appeals from a judgment and six decrees (16th August 1909) of the High Court at Calcutta, which reversed a

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judgment and six decrees (17th September 1906) of the Subordinate Judge of Mymensingh.

The representatives of the plaintiff were appellants to His Majesty in Council.

The only questions for determination on this appeal were (i) whether the appellants have established their title to the properties in suit; (ii) if they have done so, whether the properties in suit were sold for legal necessity; and (iii) the effect of the appellants having assented to the sales.

One Brajanarain Dhur Biswas of the village in Tappa Ram Bhawal, district Mymensingh, died in 1845 or 1846 childless, and leaving surviving him two widows Golokemoni and Joydurga who succeeded to his property as joint heiresses.

After Brajanarain's death his widows on various dates, between 12th August 1848 and 1st July 1865, sold practically the whole of his immoveable property to various persons for an aggregate sum of about Rs. 2,900. A list of the sales is set out in the judgment of the Judicial Committee.

The sales purported to be for legal necessity, and to convey not merely the rights of the widow, but absolute estates to the purchasers. The appellants' case, however, was that there was in fact no such necessity, and that the sales were only legally binding for the widows' lifetime.

Golokemoni died on 9th June 1890, and Joydurga on 6th June 1902; and on 20th May 1905 Nanda Lal Dhur Biswas, the father of appellants, 1 and 2 (Banga Chandra Dhur Biswas and Bepin Chandra Dhur Biswas) claiming to be the next reversionary heir of Brajanarain at the death of Joydurga, and appellant 3 (Jogesh Chandra Chakravarti) who had purchased a half share of Nanda Lal's rights in the estate, instituted the suits out of which these appeals arose. They

made defendants, amongst others, the respondents the successors in title of the purchasers of the properties from the widows, and claimed that the sales were fraudulent and collusive and not made for legal necessity, and that they were invalid and inoperative against Brajanarain's heirs, and prayed for recovery of possession, for mesne profits, and other relief.

The main grounds of defence raised by the defendants were that Nanda Lal Dhur Biswas was not the nearest heir (agnate) of Brajanarain, and alleged that he had no title whatever to the properties in suit. They asserted also that the sales by the widows were made for legal necessity, that they were with the assent of Nanda Lal and his uncles, and that they were valid and binding as absolute conveyances of the respective properties.

The Subordinate Judge held (*inter alia*) that Nanda Lal Dhur was the nearest heir of Brajanarain at the death of Joydurga, the surviving widow, his heirship being established by genealogical tables produced, respectively by Nanda Lal himself, and Gagan Chandra Dhur, one of his witnesses. He also held that the sales had not been shown to be fraudulent, collusive, or without consideration; but that the defendants had not proved that they were made for legal necessity. He accordingly decided the suits (except with regard to some small portions of the properties) in favour of the plaintiffs.

The defendants appealed, some to the High Court, and others to the District Judge, but all the appeals to the District Court were transferred to the High Court for hearing with the others.

The High Court (CHITTY and CARNDUFF JJ.) held that the genealogical tables were not genuine, and the evidence of Nanda Lal and of his witnesses to the alleged relationship with Brajanarain was quite

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untrustworthy; and that the defendants had proved that Brajanarain and his widows belonged to a *gotra* different from that to which Nanda Lal and his witnesses asserted that he belonged, which was fatal to his claim to be Brajanarain's heir. The plaintiffs had failed therefore to establish Nanda Lal's title. The High Court further held that Nanda Lal had himself attested some of the deeds of sale, and that they had also been attested by his uncles Ram Narayan Dhur, and Ram Kanta Dhur who would at the time have been the next reversioners, if Nanda Lal's case as to his relationship were true. It was also held by the High Court that the evidence adduced by the defendants had established the fact that the sales had been made by the widows for legal necessity.

The decrees of the Subordinate Judge were accordingly reversed, and the suits were dismissed with costs.

On the question of necessity the findings of the High Court were (a) that the recitals of necessity in the sale deeds, though not conclusive evidence of it, must be considered with the other evidence, and could not be entirely disregarded; (b) that there were undoubtedly decrees against Brajanarain, to satisfy which some of the alienations were made; (c) that Nanda Lal had attested two of the sale deeds as a witness, and that this of itself was very good evidence of necessity in those two instances; (d) that the fact that Nanda Lal had not taken steps to assert his rights during the lifetime of the widows, coupled with the fact that he attested, and so presumably consented to two of the alienations told most strongly against him; and (e) that on the whole there was sufficient evidence on the record of legal necessity for the sales.

On this appeal the argument was confined to the question of legal necessity.

De Gruyther, K. C. and *Sir William Garth*, for the appellants, contended that there was no sufficient evidence of legal necessity for the sales by the widows. As to that, the onus of proof lay on the respondents who alleged the existence of necessity. Recitals in deeds were not of themselves evidence of necessity, but needed substantiation by evidence *aliunde*: *Brij Lal v. Indar Kunwar* (1). As to the power of alienation of a Hindu widow in possession of her husband's estate, the cases of *Sham Sunder Lal v. Achhan Kunwar* (2), *Maheshar Baksh Singh v. Ratan Singh* (3), and *Hunoomanp r Saud Pandey v. Munraj Koonweree* (4) were referred to. There was practically no evidence of decrees against the husband, nor of discharge of his creditors, that is there was nothing to show that the alienations were made to satisfy them. The widow was not entitled to dispose of the whole estate for the performance of the *shraddh* of her husband: *Mayne's Hindu Law*, 7th Ed., paragraph 632, pages 849, 850. It was not proved that Nanda Lal had attested the two deeds he is alleged to have witnessed; and even if he had, the High Court was wrong in relying on such attestation as proof of necessity, or of consent by him to the alienations. Mere attestation did not prove his consent, nor his knowledge of the contents of deeds which it was necessary to show before he could be considered bound by them: *Hari Kishen Bhagat v. Kashi Pershad Singh* (5). [THE LORD CHANCELLOR. You will admit that the necessity of the widow is greater according to the higher social position she occupies.] Natives in India can live upon an inconceivably small sum. A condition of prosperous

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(1) (1914) I. L. R. 35 All. 187. (3) (1896) I. L. R. 23 Calc. 766, 771;

(2) (1898) I. L. R. 21 All. 71, 80; L. R. 23 I. A. 57, 61.

L. R. 25 I. A. 183, 190. (4) (1856) 6 Moo. I. A. 393, 418.

(5) (1914) I. L. R. 42 Calc. 876; L. R. 42 I. A. 64.

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circumstances cannot be measured there as it is in England.

Sir H. Erle Richards, K. C., and *A. M. Dunne*, for the respondents, contended that the sales by the widows were for legal necessity, and passed the absolute title in and to the properties sold to the purchasers. It was perfectly well known at the time both to the purchasers and to every one connected with the family of the ladies who were making the alienations, that they were selling the properties absolutely in consequence of legal necessity, and from the date of the transactions, 1848 to 1865, up to 1905, during a period of from 40 to 57 years, the properties had been held and dealt with as having passed absolutely under the various sales to the respective purchasers. The evidence on the record sufficiently discharges the onus on the respondents to show necessity. As to the recitals in the deeds, though not evidence of necessity, the High Court, it was submitted, was right in saying they were of some weight and could not be disregarded altogether.

[THE LORD CHANCELLOR. In England they are made evidence by Statute; there is no such Statute in India; how do you make such recitals evidence?]

They are evidence of representation to the purchasers, and bind the widow and those taking through her. Reference was made to *Hunoomanpersaud Pandey v. Munraj Koonweree* (1) the passage commencing with, "Necessity varies with the circumstances of the case, etc." A recital the truth of which was probable and reasonable under the then circumstances would be evidence, after the time had gone by when proof was possible, as it had done in this case. There must be some presumption that the lender made *bond fide* enquiry for his own sake before advancing the money.

(1) (1856) 6 Moo. I. A. 393, 418.

Maheshar Baksh Singh v. Ratan Singh (1) was a very different case from the present one: there is not any statement that the debts there were the debts of the husband. Here there were debts in respect of some of which decrees had been made against Brajanarain; the High Court finds that is undoubted. There was no case of necessity in *Hari Kishen Bhagat v. Kashi Pershad Singh* (2). There were concurrent findings against its existence. Nanda Lal himself attested several of the deeds as did other members of his family.

[THE LORD CHANCELLOR. The mere attestation of a deed cannot affect the attestor with a knowledge of what the deed contains.] When you get members of a Hindu family witnessing family deeds their doing so implies that they know something of the transactions in respect of which the deed is made: all the family know what is going on, so it is some evidence of consent.

D:Gruyther, K.C., replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. These six consolidated appeals arise out of six suits commenced by one Nanda Lal Dhur Biswas and Jogesh Chandra Chakravati, claiming against the various defendants possession of certain lands. The first-named plaintiff has died since the institution of the suits, and his representatives, together with the other plaintiff, are the present appellants.

The property in question formed the whole estate of one Braja Narayan, deceased, and was the subject of certain conveyances executed at various dates by one

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(1) (1896) I. L. R. 23 Calc. 766; (2) (1914) I. L. R. 42 Calc. 876;
L. R. 23 I. A. 57. L. R. 42 I. A. 64.

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or both of his two widows. The first-named plaintiff alleged that he was the adopted son of Braja Narayan, but this claim, though supported by the Subordinate Judge, who decided in favour of the plaintiffs in all the suits, was rejected by the High Court, from whose judgment these appeals are brought, but it is not necessary to consider this question unless the conveyances can be set aside. Now it is clear that in the circumstances these conveyances cannot be supported unless it is established that the sales they purported to effect were made under circumstances of legal necessity justifying the widows, who were only entitled to the usufruct of the property, in disposing of the entire estate.

The burden of proving that the dispositions were lawful rests on the respondents: see *Maheshwar Eaksh Singh v Ratan Singh*(1).

The facts of the case are these. Braja Narayan was a Hindu, who lived in the village of Ushti. He occupied a position of some importance in the village and died in 1845, childless, leaving two widows, Golokemoni and Joydurga, who succeeded him as joint heir-esses of his property. Golokemoni died on the 8th June, 1890, and Joydurga on the 6th June, 1902. During their lifetime they disposed of all the property inherited from their husband by the following deeds:—

12th August, 1848: Both widows to Radha Kanta Das, for 175 rupees.

17th June, 1853: Both widows to Kali Narayan Roy Chowdhuri, for 1,000 rupees.

26th December, 1856:—Golokemoni to G. P. Wise, for 350 rupees.

10th December, 1859: Golokemoni to Goloke Nath Das, for 250 rupees.

(1) (1896) I. L. R. 23 Calc. 766; L. R. 23 I. A. 57.

23rd September, 1860 :—Joydurga to T. A. Wise,
for 700 rupees.

4th December, 1860 : Golokemoni to Bejoya
Gupta, for 110 rupees.

18th September, 1864 : Golokemoni to Golok
Chandra Das, usufructuary mortgage, for 100
rupees by an ijara patta.

1st July, 1865 : Joydurga to Shaik Dhondi, for
215 rupees.

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It was originally asserted that these sales were at an undervalue, but the appellant failed to establish this contention, and it has been now definitely abandoned. It may, therefore, be accepted—and it is a material circumstance—that the whole property was disposed of at its full value by small conveyances realising sums from 175 rupees up to 1,000, and each of the deeds contains recitals alleging various facts to show that there was legal necessity which would justify the transaction.

It is not necessary to examine each of these recitals in detail. Speaking generally the necessity which they put forward is the necessity of providing means for payment of debts of the deceased, of the expenses consequent on the *sradh* and the satisfaction of debts incurred by the widows for the purpose of obtaining the money necessary for the payment of the debts of the deceased and of the expenses of religious ceremonies. In general terms the facts recited would establish the necessity alleged, but it is well established, that such recitals cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. Indeed it is obvious that if such proof were permitted the rights of reversioners could always be defeated by the insertion of carefully prepared recitals. Under ordinary circumstances and apart from statute, recitals in deeds can only be

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evidence as between the parties to the conveyance and those who claim under them.

But in such a case as the present their Lordships do not think that these recitals can be disregarded, nor, on the other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance, and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time.

The present case well illustrates the necessity of this view. Nearly sixty years passed between the

date of the first deed and the institution of these proceedings, and the attempt to support by contemporary evidence statements as to the private affairs of the deceased man or of his widows has only resulted, as might have been expected, in a number of witnesses attempting to give first-hand evidence upon matters which occurred when they were of tender years, and now can only be dimly and imperfectly remembered. Their Lordships are not surprised that the learned Judge who tried the case rejected this evidence as untrustworthy, and they place no reliance upon it.

There are, however, facts which are not in dispute, and they appear to their Lordships sufficient to support the validity of the transactions which it is sought to challenge. The total value of the estate which the two widows inherited was 2,900 rupees. That some expense must have been incurred, and properly incurred, in connection with the *sradh* might be safely assumed. That the deceased should have left no debts at all is extremely improbable, and, indeed, one of the recitals referred in specific terms to a particular decree in favour of a named creditor. If no explanation whatever could be offered as to the absence of any record of this decree, the circumstance would place a difficulty in the respondents' way. But it appears that the records of the Court, by which the decree might reasonably be assumed to have been made, extending over a period from 1843 up to the death of the deceased, have been destroyed by an earthquake, and their Lordships are, therefore, not prepared to allow the lack of proof of the decree to weigh against the respondents' position.

Now the legal necessity that would support these conveyances is the necessity for maintenance of the widows, and that maintenance need not be measured merely by a sufficient sum to support bare existence.

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The periods at which the properties were sold, the small sums for which the sales were made, and the disposition of the property piece by piece with fair regularity for a period of sixteen years, all go to support the view that the widows found themselves unable to provide sufficient maintenance out of the income of the estate. It is impossible at this lapse of time to consider minutely the exact amount of money out of which these women might have maintained themselves. If the total amount of the estate had been such that it could safely have been assumed its usufruct would have provided a sufficient sum, different considerations would have arisen. But that is not the case. In 1865 all the property was exhausted and the widows' means were at an end. From that time until their death they lived with relations.

The circumstances, therefore, are sufficient to justify the assumption that proper enquiry would have disclosed that real necessity existed.

It is, however, urged on behalf of the appellant that even if this be so, the reasons urged in these recitals differ from the suggestion that the sale was necessary for the maintenance of the widows. Their Lordships do not accept this view. If money were needed for payment of the debts, the amount available for maintenance would to that extent be reduced, and if the debts had been paid by the widows out of borrowed money, it would make no difference whether they urged as the reason for the sale the necessity to pay debts or the necessity of maintaining themselves.

It is admitted that there was only one fund available for all purposes. Whatever the debts of the deceased may have been, it was out of this fund that they had to be defrayed, and all proper and necessary expenses could only be provided from the same source. Their Lordships have entirely disregarded the verbal

evidence upon the question of what debts were owing from the deceased. The learned Trial Judge who tried the case rejected such evidence as untrustworthy, and the insistence of practical proof of the financial condition of the estate of a dead man after the lapse of sixty years can only result in the production of evidence which must, except in special circumstances, be untrustworthy. Their Lordships think it right to add, in conclusion, that they do not agree with the decision of the High Court as to the effect of the attestation of two of the deeds by the appellant. They think it may be safely accepted that he did, in fact, attest them. But attestation proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed nor affect him with notice of its provisions. It could, at the best, be used for the purpose of cross-examination, in order to extract from the witness evidence to show that he was, in fact, aware of the character of the transaction effected by the document to which his attestation was affixed. If it had been quite impossible for either of the widows lawfully to dispose of any interest in the property, and it was shown that the witness knew the nature of the deed, more value might be given to his attestation, but by itself it would neither create estoppel nor imply consent: see *Hari Kishen Bhagat v. Kashi Pershad Singh* (1).

In the opinion of their Lordships, therefore, these appeals should fail, and they will humbly advise His Majesty that they should be dismissed with costs.

Their Lordships cannot, however, part with this case without expressing their concern at the delay that has taken place.

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The proceedings were instituted on the 20th May, 1905, the decrees of the Subordinate Judge were made on the 17th September, 1906, and the decrees of the High Court on the 16th August, 1909. Yet these appeals were not set down for hearing until April of this year. Their Lordships have been unable to extract any sufficient reason for this delay. The representatives of the parties over here may well be unable to furnish explanation ; but unexplained, it constitutes a grave reproach to the administration of justice. All the respondents have been unjustly attacked in the lawful possession of their property, and for nearly seven years they have been subject to the anxiety and distress of knowing that the judgment of the High Court in their favour was subject to the inevitable uncertainties of the law. Had this appeal succeeded, their Lordships would have refused to allow the appellants any costs of the appeal unless they could have cleared themselves of the imputation of having needlessly protracted the proceedings, and the same course will be taken in similar cases in the future should the occasion arise.

Appeals dismissed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondents: *Watkins & Hunter.*

J. V. W.

PRIVY COUNCIL.

DIWAKAR RAO

v.

CHANDANLAL RAO.

P.C.^o
1916June 28, 29 ;
July 24.[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF THE
CENTRAL PROVINCES.]

*Hindu Law—Adoption—Suit to have alleged adoption declared valid—
Evidence of adoption—Absence of any deed or written record of adop-
tion—No entries of expenditure on ceremonies in account books—Adopted
child's name not changed and child left with its natural parents.*

In this appeal which arose out of a suit by the natural father of the appellant to have his adoption declared valid, their Lordships of the Judicial Committee (affirming the decision of the Court of the Judicial Commissioner of the Central Provinces) *held*, on the evidence, that the alleged adoption was never made. It appeared that though the suit might well have been brought in the life-time of the alleged adoptive father, who consistently denied that the adoption ever took place, it was not commenced until some months after his death.

There was no deed of adoption or any other formal record of the event.

Sootrugun Sutputty v. Sabitra Dye (1) referred to.

There was no reference to any expenditure on the ceremony in the account books of either the natural or the adoptive father.

Lal Kunwar v. Chiranjil Lal (2) referred to.

No feast was proved to have taken place on the occasion of the alleged adoption ; the ceremonies said to have been performed were of the briefest possible description ; no notification was made to the authorities ; the child's name was not changed, and he was never taken to live with his adoptive parents, or recognised by them in any way ; and all the surrounding circumstances and conditions not only did not support the adoption, but made it highly improbable that the ceremony of adoption was ever performed in regard to the appellant.

^o *Present* : LORD SHAW, LORD PARMOOR AND MR. AMEER ALI.

(1) (1834) 2 Knapp P. C. 287, 290. (2) (1909) I. L. R. 32 All. 104 ;
L. R. 37 I. A. 1.

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APPEAL No. 22 of 1914 from a judgment and decree (16th April 1910) of the Court of the Judicial Commissioner, Central Provinces, which reversed a judgment and decree (8th March 1909) of the Court of the District Judge, Bhandara.

The plaintiff was the appellant to His Majesty in Council.

The only question for determination in this appeal was whether the minor appellant, Diwakar Rao, was, on 10th November 1898, validly adopted by one Mahipat Rao Bhau as his son. Diwakar Rao was born on 26th October 1898 at Phulchur, where his natural father and next friend Indraraj Bhau, a zamindar, resided. His adoptive father, Mahipat Rao now deceased, was very nearly related to Indraraj and resided at Hatta. At the time of the appellant's *barsa*, a ceremony which takes place on the 12th day after the birth of an infant, Mahipat Rao with his two wives, Jasoda Bai and Bhaga Bai, the second and third respondents, went to Phulchur where the ceremony was performed. They were present at the *barsa* ceremony and stayed on at Phulchur for a few days after it. On 10th November 1898, Mahipat Rao duly adopted Diwakar Rao in the presence of a number of persons, and two or three days afterwards returned to Hatta with his two wives leaving the infant boy with his natural parents.

The adoptive father, Mahipat Rao, died at Hatta on 7th May 1907 leaving a will dated 5th May 1907, and a codicil thereto, dated 6th May 1907. In these testamentary documents it is stated that he adopted Chandanlal, the first respondent, who was Mahipat Rao's brother's daughter's son on 5th May 1907. Mahipat Rao's property was left by his will and codicil to Chandanlal the testator's two widows, Jasoda Bai and Bhaga Bai, and the widow and two daughters of the testator's brother. The property so disposed of was

admittedly ancestral property, moveable and immoveable, of considerable value, and the beneficiaries obtained possession of it after Mahipat Rao's death.

On 25th July 1907. Diwakar Rao by his next friend Indraraj Rao instituted the suit which gave rise to the present appeal, making defendants the beneficiaries under the will and codicil. The plaintiff alleged that the plaintiff was duly adopted by Mahipat Rao; that as the will and codicil disposed of ancestral property, they were void and of no effect as against the plaintiff; that the alleged adoption of Chandanlal, if made, was invalid on the ground (*inter alia*) that Mahipat Rao could not make a second adoption during the life-time of his adopted son, the plaintiff, and that the plaintiff as adopted son was entitled to all the property left by Mahipat Rao. The plaintiff prayed for declarations to that effect.

The defendants filed a joint written statement denying that Mahipat Rao ever adopted the plaintiff as his son.

The District Judge held that the adoption was proved and that the property in dispute was ancestral and the will and codicil therefore were not binding on the plaintiff. He accordingly decreed the suit with costs.

On appeal by the defendants, the Court of the Judicial Commissioner (MR. H. V. Drake-Brockman) reversed the decision of the District Judge on the ground that the plaintiff had not proved that he was the duly adopted son of Mahipat Rao. He accordingly allowed the appeal and dismissed the suit with costs.

On this appeal,

De Gruyther, K. C., J. M. Parikh and *B. K. Mantri*, for the appellant, contended on the evidence that it established the adoption. They relied chiefly on the

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judgment of the District Judge which was based on the oral evidence in the case, no less than 26 of those called to support the adoption, being eye-witnesses of the adoption ceremony; and it was submitted that apart from other evidence in the case their evidence established the *factum* of the adoption. Of these the District Judge remarked that he saw no reason for distrusting their evidence; and that the oral evidence was ample, and quite satisfactory to prove that the adoption took place.

Sir R. Finlay, K. C., Sir H. Erle Richards, K. C., and A. M. Dunne, for the respondents, contended that the appellant had not proved that he was adopted by Mahipat Rao, who had consistently denied the adoption. The fact that there was no deed or formal writing recording the adoption was strongly commented on; and the case of *Sootrugun Sutputty v. Sabitra Dye* (1) was cited which laid down the principle that the absence of any deed or written acknowledgment should cause the evidence of an adoption among wealthy zamindars (such as the natural and adoptive parents in the present case) to be regarded with extreme suspicion. Mayne's Hindu Law, 7th edition, page 203, paragraph 151, was also referred to. It was also pointed out that there was no record of any expenditure on the ceremony either in the accounts books of the natural or the adoptive father, and reference was made to *Lal Kunwar v. Chiranji Lal* (2) to show that that also was a suspicious circumstance. Other facts referred to were that there was no festivity on the occasion, no change was made in the name of the child adopted, and that he was, after the alleged adoption, left with his natural parents, and never was taken to live with his adoptive parents; also that the

(1) (1834) 2 Knapp P. C. 287, 290.

(2) (1909) I. L. R. 32 All. 104 ;
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suit had been deliberately delayed until the alleged adoptive father had died.

De Gruyther, K. C., replied.

The judgment of their Lordships was delivered by

LORD PARMOOR. The only question raised in this appeal is whether the late Mahipat Rao Bhau adopted the appellant Diwakar as his son, and heir to the Hatta Zamindari, on the 10th November 1898. If the adoption did take place, the adoptive father could not subsequently revoke the adoption. It is not argued that he had any such power.

The appellant was born on the 26th October, 1898, and was the second son of Indraraj Bhau. Mahipat Rao was a relation on the agnatic side and had had eight children by his deceased wife, all of whom had died in infancy, except Gotoo, who died in 1894 aged about 16. At the time of the alleged adoption Mahipat Rao had two young wives, one married in 1891, and one in 1895. There was no reason why he might not have further issue; two children were in fact born to him at a later date. Both Indraraj and Mahipat Rao were Zamindars of considerable position.

There was no deed of adoption and the case for the appellant depends almost entirely on oral testimony. The Judge of the District Court found in favour of the appellant. This judgment was reversed in the Court of the Judicial Commissioner, Central Provinces. In their Lordships' opinion it is important to appreciate the general position of the parties and the surrounding circumstances before attempting to determine what weight should be attached to the evidence called on behalf of the plaintiff.

Indraraj, the appellant's father, resided at Fulchur. Mahipat Rao with his two wives, respondents Nos. 2, and 3, went to Fulchur to be present at the appellant's

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barsa, a ceremony performed twelve days after the birth of an infant. They stayed at Fulchur a few days after the *barsa* and the alleged adoption is said to have taken place on the 10th November, 1898. Subject to two matters, to which attention will be drawn, it is clear that Mahipat Rao from the outset and during his life consistently denied that the plaintiff was his adopted son. A letter of the 10th February, 1899, written only three months after the date of the alleged adoption supports the case of the respondents and is inconsistent with that of the appellant. This letter refers to arrangements having been made "for taking of younger Bhau's *zalar* near Pinglai Goddess on the 18th February, 1899." In reference to this letter, Indraraj says in his evidence: "The removal of the first hair of a boy in my family is made in the temple of Pinglai at Bhandara." When the appellant's hair was removed Mahipat Rao was invited, but for some reason or other he was unable to attend. It is further stated that Mahipat Rao did not bring his children to Bhandra to be shaved, and that he had not written to Indraraj in reference to the ceremony. At some time between the 11th January and the end of March 1899, Kaluram Pachourey, District Saugor, visited Mahipat Rao, and had a talk with him about the adoption of the boy. His evidence is that Mahipat Rao told him that the members of Lataria Bhau's family expressed to him a desire that the new-born son might be adopted by him but that he did not express his willingness, or agree to the proposal. In August 1902, Indraraj was told by Mr. Laurie that Mahipat Rao was denying that he had adopted the appellant, and Indraraj states that after this denial he had no talk with Mahipat Rao about the adoption. The evidence of Mr. C. E. Low, who was the Deputy Commissioner of Balaghat throughout the year 1906, is to the same effect. He says that Indraraj

had a talk with him about the marriage of his son (the appellant), and that Indraraj asked him to persuade Mahipat Rao to admit that he had adopted the appellant. After this conversation Mr. Low saw Mahipat Rao, who said that he did not admit the adoption and could not bear the expenses of the appellant's marriage. On the 17th January, 1907, Indraraj wrote to Mahipat Rao, saying that it was eight years since he had taken the appellant in adoption, and that the marriage ceremony of the appellant could not under any circumstances be postponed. On the 26th January, Mahipat Rao replied, saying that the whole story was false and that the act of adoption had not been done at all. It is unnecessary to examine further this part of the case since the counsel for the appellant was unable to point to any act or statement of Mahipat Rao which in any way admitted the adoption of the appellant, except a statement in a letter written by Kelkar in 1902, and an alleged procession at Hatta on the 2nd June, 1901, at which date it is said that the appellant was taken to Hatta with his natural parents with some pomp, and that the visit was the occasion of considerable rejoicings. The incident of the alleged procession at Hatta is put forward as an important factor in the plaint of the appellant, but the evidence was disbelieved by both Courts, and throws suspicion on the appellant's case.

Kelkar was the pleader representing the respondents, but called as a witness on behalf of the appellant towards the end of the appellant's case. A letter said to have been written by Kelkar to Indraraj on the 2nd February, 1902, was produced, in which Kelkar said that Mahipat Rao admitted that the appellant was his son. The importance of the letter is that it supports the view that Mahipat Rao did admit on this occasion the adoption of the appellant. Kelkar himself states

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that he had a talk about adoption with Mahipat Rao subsequent to the letter, and that Mahipat Rao then emphatically denied the adoption, and that to his recollection Mahipat Rao never at any other time made any admission as to the adoption, and that his impression was that Mahipat Rao was denying the adoption; and that he said so to Mr. Low and Mr. Bathurst. Their Lordships cannot attach any importance to a letter produced under such circumstances, and which contains a statement in direct contradiction of what is proved to be the general attitude of Mahipat Rao in denying the adoption of the appellant. There is no reason to doubt that Mahipat Rao did from the outset consistently deny that he had adopted the appellant. Under these circumstances, it is a matter for grave suspicion that, though it was open to Indraraj to commence a suit claiming to have the adoption of the appellant declared valid, no such suit was commenced until two and a half months after Mahipat Rao's death.

The case for the respondents is further strongly corroborated by the absence of any reference to expenditure on the ceremony of adoption, either in the accounts of Indraraj or Mahipat Rao. The importance of the evidence afforded by accounts has been recognised by this Board [*Lal Kunwar v. Chiranjī Lal* (1)]:—

"Having regard to the well-known and often proved habits of the Indian people with regard to the keeping of accounts, recording their most minute transactions, the non-production of any book, in which anything connected with the ceremony was entered, covers the plaintiff's case with suspicion."

The accounts of Indraraj are set out in the record starting from the 6th November, 1898, and extending over the period in which the adoption is said to have taken place. There are a number of items of expenses

incurred in connection with the appellant's *barsa*, but not a single item of expenditure in reference to the ceremony of adoption, or any entry which indicates that any such ceremony ever took place. It was suggested that the expenses of the ceremony of adoption might be found in the accounts of Mahipat Rao as the adoptive father. Mahipat Rao's accounts set out in the record tell the same story. There is no item of any expense incurred in the ceremony of adoption, although a considerable sum is included under the head of *barsa* expenses.

There was no deed of adoption or any other formal written record of the event at the time. The appellant's horoscope was produced at the hearing by the family astrologer, but if any importance is to be attached to this document it is not to the advantage of the appellant's case. This document was filed on the 25th October 1907. The witness alleges that the red ink postscript, reciting the appellant's adoption, was written on his return after performing the ceremony, but it is made more than suspicious by the addition of the names of Mr. Rajuram and Prated. The detailed horoscope was prepared two years after the birth of the appellant, but it describes him as the son of his natural father and there is no reference to adoption except in the passage which has been specially translated. This passage predicts evil to the adoptive father eight years after the appellant's births, and it is difficult to avoid the conclusion that it was prepared after the death of Mahipat Rao. Although a deed of adoption, or a formal written record of the fact of adoption, may have to be carefully scrutinised if forgery is alleged, it is certainly remarkable that in such a case as the present no deed or other formal written record can be produced which gives any support to the claim made on behalf of the appellant. This Board in

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“Although neither written acknowledgments, nor the performance of any religious ceremonial, are essential to the validity of adoptions, such acknowledgments are usually given, and such ceremonies observed, and notices given of the times when adoptions are to take place, in all families of distinction, as those of Zamindars or opulent Brahmins, that wherever these have been omitted, it behoves this Court to regard with extreme suspicion the proof offered in support of an adoption. I would say, that in no case should the rights of wives and daughters be transferred to strangers, or more remote relatives, unless the proof of adoption, by which that transfer is effected, be proved by evidence free from all suspicion of fraud, and so consistent and probable as to give no occasion for doubt of its truth.”

It is an additional factor that no feast is proved to have taken place on the occasion of the adoption, that the ceremonies, said to have been performed, were of the briefest possible description, that no form or notification was made to the authorities, that the child's name was not changed, and that he was never taken to live with his new family or recognised by them in any way. It is not too much to say that not only do their Lordships find no act or document to support the claim of the appellant, but that, on the contrary, all the surrounding circumstances and conditions point in the opposite direction and make it highly improbable that Mahipat Rao did adopt the appellant at the alleged date.

Their Lordships have carefully considered the oral evidence and have come to the conclusion that, having regard to the conditions and circumstances already mentioned, it is quite insufficient to support the case of the appellant. They agree with the view of the Judicial Commissioner and think it is unnecessary to analyse the evidence in detail. There are, however, two witnesses of special importance, Indraraj and Mr. Rajaram. Much reliance was placed upon the

evidence of Mr. Rajaram, but in reality it gives no support to the appellant's claim. Mr. Rajaram knew Indraraj, but did not remember to have seen Mahipat Rao except on one or two occasions in Fulchur. He remembered going to Fulchur from Gonda on one occasion, and sat in the *mandap* which was erected for receiving guests for some ceremony. He was received by Mahipat Rao, but cannot recollect whether he said to him that he had a mind to adopt the appellant, or that he had adopted him. He was present about half an hour and no ceremony of any kind was performed in his presence. He did not consider the talk of any importance to him in his private or official capacity. He is not prepared to contradict Mahipat Rao if he said that he merely intended to adopt the plaintiff, but that there was no form or complete adoption. It is on this evidence that the District Judge appears largely to base his opinion that the appellant had been adopted by Mahipat Rao, but their Lordships cannot attach the same weight and importance to it, and consider it to fall far short of the requirements necessary to establish the fact of adoption when there is no deed or formal written document, and all the surrounding facts point to a different conclusion.

The inconsistencies in the case put forward on behalf of the appellant, are attempted to be explained on the view that Mahipat Rao was in the first instance very desirous to adopt the appellant, and that he subsequently changed, or was persuaded to change, his opinion. This theory of the attitude of Mahipat Rao runs through the evidence of Indraraj, but there is nothing to corroborate his evidence or to give it probability. He says that on the next day, after the *barsa* ceremony, he came to know that Mahipat Rao wanted to adopt the plaintiff, and that on his refusal, Mahipat Rao was displeased, and began to

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make preparations to leave the next day, and that, consequently, after consultation with his relatives, he came to the conclusion that there was no harm in giving this boy in adoption, that the adoption took place the same or the next day, and that Mr. Rajaram was present. There is no doubt that it was the interest of Indraraj that the appellant should be adopted as the son of Mahipat Rao, and heir to the Hatta Zamindari, and if the adoption took place that it should take place under conditions which would not lead to subsequent doubt and dispute. It appears not only that no such precautions were taken, but that there is no explanation of the haste with which the alleged ceremony is said to have been performed or the absence of all formal record of so important an event. The remainder of his evidence is equally unsatisfactory. The incidents of the ceremonial visit to Hatta are not believed in either Court, there is no explanation of the continued residence of the appellant at the home of his natural father, or of the removal of the first hair of the boy in the temple of Pinglai at Bhandara, or of the arrangements for his marriage which Mahipat Rao declined to attend.

In August 1902 Indraraj went to Nagpur when Mahipat Rao attended a meeting of the Police Commission. He admits that, while at Nagpur, he heard from Sir A. Fraser, Mr. Craddock and Mr. Laurie that Mahipat Rao denied the adoption of the appellant, and there is no doubt that at this time Mahipat Rao's attitude had raised a serious question in the mind of Indraraj, but he took no steps to establish the fact of adoption. Their Lordships are not satisfied of the accuracy of the account of Indraraj's interview with Mahipat Rao on his return from Nagpur. Their Lordships have already referred to the letter said to have been written by Kelkar and its production does not

tend to make the evidence of Indraraj more trustworthy. It is said that Indraraj is an Honorary Magistrate who has received from Government the title of Rao Bahadur, and that it is unlikely that such a person would bring a false case into Court. Their Lordships do not forget this consideration, but are unable to come to any other conclusion than that the evidence of Indraraj cannot safely be relied on and that it is not so free from all suspicion of falsehood and so consistent and probable in itself that it can be accepted as establishing the claim of the appellant, either of itself, or in conjunction with the other evidence adduced on the appellant's behalf.

In the result their Lordships agree with the conclusions of the Judicial Commissioner and will humbly advise His Majesty that the appeal be dismissed. Indraraj Bhau must personally pay the respondents' costs.

Appeal dismissed.

Solicitor for the appellant : *Edward Dalgado.*

Solicitor for the respondents : *Latteys & Hart.*

J. V. W.

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LETTERS PATENT APPEAL.

Before Sanderson C.J. and Mookerjee J.

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May 23.

SARAT CHANDRA DUTT

v.

JADAB CHANDRA GOSWAMI.*

Tenancy at will—Yearly rent reserved—Lease, whether by registered instrument only—Transfer of Property Act (IV of 1882), s. 107.

Section 107 of the Transfer of Property Act does not lay down that a lease of immovable property can be made only by a registered instrument ; but it can be made only by a registered instrument in three cases *viz.*, (i) a lease from year to year, (ii) a lease for any term exceeding one year, and (iii) a lease reserving a yearly rent.

The fact that the rent is reserved at so much a year does not conclusively show that the tenancy is from year to year.

The terms of a tenancy which does not come within section 107 of the Transfer of Property Act can be proved by oral evidence.

Lala Surabh Narain Lal v. Catherine Sophia (1), *Fazel Sheikh v. Keramuddi Sheikh* (2), *Sita Nath Pal v. Kartick Gharmi* (3) and *Venkata-giri Zamindar v. Raghava* (4) referred to.

APPEAL, under s. 15 of the Letters Patent, by Sarat Chandra Dutt, the defendant.

One Jadab Chandra Goswami sued the defendant, Sarat Chandra Dutt, for rent for the years 1911 to 1914. The defendant denied the relationship of landlord and tenant. The land being situated in the Pabna Municipality, the Transfer of Property Act was applicable. The plaintiff based his claim on an oral agreement of tenancy. Babu Phani Bhusan Bannerjea, Additional

* Letters Patent Appeal No. 27 of 1915 in Appeal from Appellate Decree No. 2885 of 1912.

(1) (1896) 1 C. W. N. 248.

(3) (1900) 8 C. W. N. 434.

(2) (1902) 6 C. W. N. 916.

(4) (1885) I. L. R. 9 Mad. 142.

Munsif of Pabna, on 22nd April 1912 decreed the suit holding that the tenancy had been established by an *ex parte* decree and by the admission of the defendant himself in a previous suit. On appeal by the defendant, Babu Surendra Nath Ghose, Subordinate Judge of Pabna, by his judgment dated 15th August 1912; was of opinion that the tenancy could not be proved except by an instrument, a yearly rent being reserved, and dismissed the suit of the plaintiff who thereupon preferred a second appeal to the High Court which was decreed by Mullick J. on 1st February 1915. The defendant then filed this appeal under section 15 of the Letters Patent.

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Babu Mohini Mohan Chuckerbutty (with him *Babu Abinash Chandra Chuckerbutty*), for the appellant. I submit, *first*, that the tenancy cannot be proved otherwise than by a registered lease: *vide* section 107 of the Transfer of Property Act; *secondly*, that the terms of an oral settlement can not be proved because an annual rent was payable; *thirdly*, even if the tenancy could be proved otherwise than by a registered lease, a special issue ought to have been raised as to what the plaintiff was entitled to for use and occupation.

[SANDERSON C. J. If an agreement for a lease is registered, is not that sufficient under section 107 of the Transfer of Property Act?]

That would render section 107 nugatory. Admittedly this is a yearly tenancy. Section 107 is authority for the proposition that a lease in the case of a yearly tenancy can only be made by a registered instrument. I say I am a tenant under another person. The finding was that the land belonged to the plaintiff and that I came in as a tenant under a verbal agreement. I submit that I am not liable to pay rent at the rate

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claimed as that can only be proved if there was a registered lease. No specific issue as to the amount of compensation for use and occupation was raised.

[*Dr. D. N. Mitra*, for the respondent. In the following cases it was held that a tenancy in India can be proved apart from a registered lease :—*Lala Surabh Narain Lal v. Catherine Sophia* (1), *Fazel Sheikh v. Keramuddi Sheikh* (2), *Sita Nath Pal v. Kartick Gharmi* (3), *Venkatagiri Zamindar v. Raghava* (4), *Yeshwadabai v. Ramchandra Tukaram* (5).]

In *Jarip Khan v. Dorfa Bewa* (6), Jenkins C. J. decided the other way with reference to section 85 of the Bengal Tenancy Act where an under raiyat's lease cannot be registered.

[*MOOKERJEE J.* Section 107 of the Transfer of Property Act does not say that a tenancy can only be created by a registered instrument.]

The *kabuliya*t says he is a tenant at will liable to ejectment with no permanent right or right of transfer and was liable to pay an annual rent of Rs. 6. I cannot deny being a tenant as I was brought on the land by the plaintiff.

The respondent was not called upon to reply.

SANDERSON C. J. In this case I think this appeal should be dismissed. It is clear that on the merits the defendant has no case whatever. The learned Munsif in the Court below found that the story which the defendant set up was a shamelessly false one. Now the defendant tries to defend this action on a technicality based upon section 107 of the Transfer of Property Act. In my judgment his defence is without foundation. That section deals with certain

(1) (1896) 1 C. W. N. 248.

(2) (1902) 6 C. W. N. 916.

(3) (1900) 8 C. W. N. 434.

(4) (1885) I. L. R. 9 Mad. 142.

(5) (1893) I. L. R. 18 Bom. 66.

(6) (1912) 17 C. W. N. 59.

classes of tenancy which are therein mentioned, namely, a tenancy from year to year, or for any term exceeding one year or reserving a yearly rent, and which can be made only by a registered instrument. It has not been shown in this case that the tenancy in question which must now admittedly be taken to exist was one of those mentioned in the section. On the other hand, the facts are as are set out by the learned Munsif in his judgment. He said, "The defendant entered into the land as a tenant of the plaintiff, paid rent for it for a number of years, allowed a decree to be passed against him without any contest and admitted the tenancy in the defence he raised in Mohananda's suit. The parties have so long conducted themselves as landlord and tenant and I think that the defendant is estopped from questioning the validity of the settlement which has been acquiesced in and acted upon." These being the facts of the case, I think the judgment of Mr. Justice Mullick was right, and there is no reason for disturbing the judgment, and this appeal should be dismissed with costs.

MOOKERJEE J. I agree that the judgment of Mr. Justice Mullick must be affirmed.

The contention of the appellant is based upon a misapprehension of the provisions of section 107 of the Transfer of Property Act. That section does not lay down that a lease of immoveable property can be made only by a registered instrument; but the Legislature has provided that a lease of immoveable property in three specified cases can be made only by a registered instrument. These cases are, *first*, a lease from year to year; *secondly*, a lease for any term exceeding one year; and, *thirdly*, a lease reserving a yearly rent. In the case before us, the plaintiff alleged that the defendant was a tenant-at-will, that his

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holding was of a temporary character, was non-transferable and was liable to be terminated by notice to quit. The plaintiff also stated that the defendant had entered upon the land on these conditions and had agreed to pay rent at the rate of six rupees a year.

It is now contended that because there was an agreement to pay rent at the rate of Rs. 6 a year, the tenancy must be regarded as a tenancy from year to year. In my opinion, there is no foundation for this contention. As explained in *Durgi v. Goberdhan* (1) and *Gobinda v. Dwarkanath* (2), the fact that the rent is reserved at so much a year does not conclusively show that the tenancy is from year to year. It is not the case of the plaintiff that the defendant holds under a tenancy from year to year; his case is that the defendant is a tenant-at-will, and a tenancy-at-will undoubtedly can be created verbally, notwithstanding the provisions of section 107 of the Transfer of Property Act.

It was finally suggested that even if the defendant be a tenant-at-will, the terms of the tenancy can be established only by means of a written lease, and the amount of rent payable in respect of it cannot be proved by oral evidence. There is no foundation for this argument. Numerous cases may be found in the books where it has been held that the terms of a tenancy which does not come within section 107 of the Transfer of Property Act can be proved by oral evidence: *Lala Surabh Narain Lal v. Catherine Sophia* (3), *Fazel Sheikh v. Keramuddi Sheikh* (4), *Sita Nath Pal v. Kartick Gharmi* (5) and *Venkatagiri Zamindar v. Raghava* (6).

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Appeal dismissed.

(1) (1914) 20 C. L. J. 448.

(1) (1902) 6 C. W. N. 916.

(2) (1914) 20 C. L. J. 455.

(5) (1900) 8 C. W. N. 434.

(3) (1896) 1 C. W. N. 248.

(6) (1885) 1 L. R. 9 Mad. 142.

APPELLATE CIVIL.

*Before Mookerjee and Cuming JJ.*TRUSTEES FOR THE IMPROVEMENT OF
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Land Acquisition—Recoupment—Compulsory acquisition—Calcutta Improvement Act (Beng. V of 1911) ss. 39, 40, 41(a), 41(b), 42(a), 49(2), 68, 69, 78, 81, 122(c), 122(d)—“Street”—“Affected”—Jurisdiction of the Civil Court—Publication of a notification under s. 49(2)—Its effect—Interpretation of Statutes—Legislature, object of, must be determined as expressed in the provisions of the Statute.

THE acquisition of land for the purpose of recoupment is not specified as one of the objects of the Calcutta Improvement Act and by no stretch of language can it be maintained that recoupment is one of the purposes of the Act. The Trustees have not been empowered to acquire land compulsorily for the purpose of recoupment and ss. 41, 42, 78, 81, 122 or 123 of the Act do not confer any such power on them. Sections 41 and 42 deal merely with matters which must be or may be provided for when an improvement scheme is framed; they do not directly or indirectly authorise the compulsory acquisition of any land. Clause (a) of section 41 refers to the acquisition of land required for the execution of the scheme; while section 78 authorises the abandonment of land not required for the execution of the scheme. Sections 78 and 81 have no connection with compulsory acquisition of land. Sections 122 and 123 only regulate the mode in which the accounts are to be kept and do not sanction compulsory acquisition of land. Section 69 is the only section in the whole Act which deals with compulsory acquisition of land and the Board, under that section, is not competent to acquire land compulsorily for recoupment. There is no foundation for the contention that the Legislature has resorted to an

* Appeal from Original Decree, No. 416 of 1915, against the decree of Umesh Chandra Chakravarti, Subordinate Judge of 24-Parganas, dated Aug. 10, 1915.

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indirect method to deprive private owners of their property by provisions in the Act which effectually confer on the Board a disguised authority to acquire land compulsorily for purposes of recoupment.

Section 78 was not intended to be used as a cover for the arbitrary acquisition of private property for purposes of recoupment—such recoupment to be made either by way of levy of a lump sum from the owner or a periodical tax payable out of the property or by way of acquisition of the land for profitable resale hereafter. Neither section 78 nor section 81 necessarily implies a power of acquisition for recoupment.

The intention to impose a charge on the subject must be shown by clear and unambiguous language. By the provisions of the fifth chapter only three taxes are imposed and it would be against well-known rules of construction of statutes to hold that another tax was, by implication, imposed upon the subject. In all instances where unlimited powers of interference are intended to be conferred on the executive authorities, the Statute puts the matter plainly and beyond dispute.

Stockton Railway Co. v. Barrett (1), *Ezra v. Secretary of State for India* (2) referred to.

It is plain that "providing building site" under section 39(a) does not mean buying up land already fit for building site or pulling down houses and selling the land for building site; it means, making it possible to use as building site land which cannot for various reasons be now used as building site.

Section 2 (n) shows that the expression "public street" has the same meaning as in section 3 (37) of the Calcutta Municipal Act. According to that definition the term "street" does not include either the abutting lands on both sides or the houses thereon. Section 41(b) only contemplates that the scheme shall provide for the lay out or relay out of such land in the area comprised in the scheme as may be validly acquired by or become otherwise vested in the Board. The section does not imply an obligation on the Board and corresponding authority on their part to acquire compulsorily all the lands situated in the area comprised in the scheme.

Section 49 (2) does not deprive the Civil Court of jurisdiction to determine whether the action of the Board is or is not *ultra vires*. It merely provides that after the publication of sanction the scheme cannot be impeached on the ground that it has not been framed and sanctioned duly, that is, in conformity with the procedure prescribed by the Act; but there is nothing in the section which takes away the jurisdiction of the Civil Court to investigate whether the action taken by the Trustees has or

(1) (1844) 11 Cl. & Fin. 590;
65 R. R. 261.

(2) (1905) I. L. R. 32 Calc. 605.

has not been in excess or in violation of statutory authority. This follows from a plain reading of section 49 and is confirmed by sections 155 and 160 which would be entirely superfluous if section 49 (2) completely barred suits of all description in the Civil Court.

When local authorities are authorised to take lands from time to time for specific works, such as street widening and the land is not specified in the Act, they cannot, in order by resale, to reduce the expense to the rate-payers, take more than is *bona fide* necessary for the purpose. The object of the Legislature must be determined as expressed in the provisions of the Statute : it is not permissible to speculate about the expressed intentions of the Legislature ; nor are we concerned with the difficulties, real or imaginary, which may arise from the adoption of the expressed intentions of the Legislature.

Donaldson v. Mayor of South Shields Corporation (1) referred to.

A section which bars a suit for an act done does not prohibit a suit for an injunction to restrain the commission of an act not done but threatened to be done.

Ganoda Sundry v. Nalini Ranjan Raha (2) referred to.

Land may well be said to be "affected" by the execution of a scheme within the meaning of section 42 (a) when, by the construction of the improvement works, there is a physical interference with any right, public or private, which the owner is entitled to exercise in connection with that property.

Metropolitan Board of Works v. McCarthy (3), *Directors of G. W. Ry. Co. v. May* (4), *King v. Huldiday* (5), *Western Counties Ry. Co. v. Windsor and Annapolis Ry. Co.* (6), *Commissioner of Public Works v. Logan* (7), *Ex parte Jones* (8), *Randall v. Blair* (9), *Duke of Devonshire v. O'Connor* (10), *Galloway v. Mayor of London* (11), *Hendon Local Board v. Pounce* (12), *Lynch v. Commissioners of the City of London* (13), *Rolls v. School Board of London* (14), *North London Ry. Co. v. Metropolitan Board of Works* (15), *Gard v. Commissioners of Sewers of the City of London* (16), *Denman & Co. v. Westminster Corporation* (17), *Kreglinger v. N. Patagonia*

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| (1) (1899) 79 L. T. 685 ; | (9) (1890) 45 Ch. D. 139. |
| 68 L. J. Ch. 102. | (10) (1890) 24 Q. B. D. 468. |
| (2) (1908) I. L. R. 36 Calc. 23 . | (11) (1866) L. R. 1 H. L. 34, 55. |
| (3) (1874) L. R. 7 H. L. 243. | (12) (1889) 42 Ch. D. 602. |
| (4) (1874) L. R. 7 H. L. 283. | (13) (1886) 32 Ch. D. 72. |
| (5) [1916] 1 K. B. 738. | (14) (1884) 27 Ch. D. 639. |
| (6) (1882) 7 A. C. 178, 188. | (15) (1859) 28 L. J. Ch. 909. |
| (7) [1903] A. C. 355. | (16) (1885) 28 Ch. D. 486. |
| (8) (1875) L. R. 10 Ch. App. 663. | (17) [1906] 1 Ch. 464. |

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Meat Co. (1), and Fernley v. Lime House Board of Works (2), Wells v. London, Tilbury Railway Co. (3) referred to.

APPEAL by the Trustees for the Improvement of Calcutta, the defendants.

This appeal arises out of an action against the Board of Trustees, Calcutta Improvement Trust, to restrain them from interfering with plaintiff's possession of 2 parcels of land which have been described as premises Nos. 40-10 and 40-10-1 Chaulpati Road. The admitted facts of the case are as follows: On the 27th of August 1912, the Board of Trustees passed a resolution for preparing a street scheme with a view to afford better facilities for traffic between Elgin Road and Hazra Road by widening the Russa Road. On the 17th of September the Board considered the merits of three alternative proposals and at last decided by resolution 5 that the scheme should provide only for the widening of Russa Road, and taking up for recoupment purposes land unoccupied or occupied by buildings of small value. A scheme was then prepared and it was adopted by resolution No. 6, dated 8th October 1912. Notices under sections 43 and 45 of Beng. Act V of 1911 were issued thereafter and objections filed by the plaintiff disposed of. The resolution, estimate of costs and papers in connection with the proceedings of the Board were then submitted to Government for sanction in June 1913 and the Government sanction was notified on 20th January 1914.

On the 22nd January 1914, the plaintiff wrote a letter to the President of the Board enquiring if the acquisition of the land would be abandoned on payment of a fee. This letter the Board treated as an application under section 78 of the Act and rejected it on 16th March 1914 on the ground that the land was

(1) [1914] A. C. 25, 40.

(2) (1899) 68 L. J. Ch. 344.

(3) (1877) 5 Ch. D. 126.

required for lay out. The plaint was then filed on 28th April 1914. Plaintiff's case is that the land is a good building site and he has constructed a *pukka* building on a portion of it; that being 55 feet away from the proposed street alignment it cannot be required for the execution of the scheme; that the action of the Board in including the land within the scheme area was not *bonâ fide* for the purpose of the Act; that the only motive for such inclusion was to buy cheap and sell dear for the purpose of gain, which is not contemplated by the Act; that the Board have not heard his objections as they were bound to do and that the whole proceeding in connection with this land was *ultra vires*. He prayed for a declaration to that effect and a permanent injunction restraining the Board from proceeding with the acquisition of the land.

The defence, *inter alia*, was that the suit was bad for want of a notice under section 156 Act V of 1911; that the plaintiff was not competent to question the scheme or any portion thereof after it had been sanctioned by the Government; that the objections were heard by a committee appointed for that purpose, that the land in suit was, in the opinion of the Board, required for the execution of the scheme and was affected by such execution; that the land was not a building site as alleged and that the Board had acted *bonâ fide* throughout.

The Subordinate Judge granted the injunction prayed for and decreed the suit. The Board appealed to the High Court.

Sir S. P. Sinha, Mr. Langford James, Mr. G. B. MacNair and Babu Ambika Pada Chaudhuri, for the appellants.

Mr. B. Chakravarti, Mr. B. K. Lahiri, Babu Dwarka Nath Chakravarti, Bibu Girija Prassana Roy Chawdhury, Babu Nilkanta Ghosh, Babu

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Prakash Chandra Pakrashi and Babu Ramgati Sarkar, for the respondent.

Cur. adv. vult.

MOOKERJEE AND CUMING JJ. This appeal is directed against a decree made in favour of the plaintiff-respondent in a suit instituted by him against the Trustees for the Improvement of Calcutta. The allegations in the plaint, which form the basis of the claim, may be briefly summarised. The plaintiff is the owner of premises No. 40-10 Chaulpati Road within the municipal limits of Calcutta, recently subdivided into Nos. 40-10 and 40-10-1. The area comprised therein is more than one and a half bighas and is situated at a distance of about 125 feet away to the west of the present Russa Road, whereof Chaulpati Road is a branch. Since his purchase of the land, the plaintiff had filled up a large tank that lay within the boundaries thereof, had raised its level and made it fit for building purpose, had constructed, with the sanction of the Municipal Corporation, a two-storied building on a portion of the land and had collected materials for the erection of other suitable buildings thereon. While the plaintiff was thus in occupation and enjoyment of his land, the Trustees framed a street scheme under the provisions of the Calcutta Improvement Act, 1911, for the purpose of widening Russa Road and published the same on the 13th November, 1912, in the *Calcutta Gazette*. The list of properties proposed to be acquired under this scheme included a major portion of the above-named premises, although the lands would lie about 55 feet away from the western border of Russa Road even after it had been widened to a breadth of 100 feet as proposed. Objections to the scheme were invited under section 43, and special notice was issued

under section 45 of the Calcutta Improvement Act, 1911. The plaintiff, thereupon, submitted his objections which, he asserts, were overruled by the Board of Trustees without consideration and examination. The trustees next submitted the scheme to the Local Government for sanction under section 48. The sanction was notified in the *Calcutta Gazette* on the 21st January 1914. Since then, the Trustees had taken steps preliminary to the acquisition of the land and had deputed officers to make a survey and prepare plans thereof. The plaintiff alleges that the proceedings adopted by the Trustees, with a view to acquire his lands, were illegal and *ultra vires*; that they had in fact acted in excess of statutory authority, that the inclusion of extensive surplus lands in the scheme had been made, not *bonâ fide* for the purposes of the Act, but with a view to make profit by the sale thereof, and that there was no justification in law for the acquisition of the disputed lands under colour of providing building sites, as the lands already constituted a good building site. On these allegations, the plaintiff asked for a declaration that the defendants Trustees had no power to acquire the lands in suit in pursuance of the Russa Road widening scheme; and that their acts in this behalf were *ultra vires* and illegal; he accordingly prayed that the defendants, their servants and agents, might be restrained by a perpetual injunction from interfering in any way with the plaintiff in his possession and enjoyment of the lands in suit. The Trustees put the plaintiff to the proof of his claim. They contended that it was not competent to the plaintiff to question the scheme or any portion thereof after notification of the sanction of the Local Government. They further asserted that the lands were required for the execution of the scheme, and were affected by the

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execution of the scheme, and that they were competent, in the exercise of their statutory powers, to take steps for the compulsory acquisition of the land. An objection was also taken that the suit was not maintainable without notice under section 156. The Subordinate Judge overruled these contentions and came to the conclusion that the action of the Trustees in including the land in suit within the scheme area on the basis of the resolution with which they started was *ultra vires* and void. He consequently granted an injunction which directs the Trustees to refrain from the acquisition of the lands in suit for the purposes of the Russa Road widening scheme. The Trustees have appealed to this Court, and on their behalf the Advocate-General has contended that the decree of the Subordinate Judge should be discharged on the following grounds, namely, *first*, that the intended acquisition of the lands with a view to recoupment, that is, to enable the Trustees to recoup themselves in whole or in part the costs of the scheme, is an Act authorised by the Calcutta Improvement Act, 1911; *secondly*, that the lands are required for providing building sites within the meaning of section 39(a) and are consequently liable to compulsory acquisition; *thirdly*, that the lands are required for the purpose of laying out or relaying out, within the meaning of section 41(b), and are, accordingly, proper subject-matter of compulsory acquisition; *fourthly*, that the lands will be affected by the execution of the scheme within the meaning of section 42(a) and have, accordingly, been properly included for acquisition by the Trustees in the exercise of their statutory discretion; and, *fifthly*, that the suit is not maintainable, as, under section 49 (2), the publication of the sanction of the Local Government is conclusive evidence that the scheme has been duly framed and sanctioned. The

questions mooted are of first impression and their determination depends primarily upon the construction of various provisions of the Calcutta Improvement Act, 1911, which must be interpreted as a whole and not isolated from each other. We shall accordingly first analyse the scheme of the Act and examine its principal provisions in so far as they are relevant for the decision of the questions raised before us.

The preamble to the Act, which is described as "an Act for the improvement and expansion of Calcutta" consists of four paragraphs. The first paragraph enumerates the objects of the Act, namely—

(A) The improvement and expansion of Calcutta by—

- (a) Opening up congested areas.
 - (b) Laying out or altering streets.
 - (c) Providing open spaces for purposes of ventilation or recreation.
 - (d) Demolishing or constructing buildings.
 - (e) Acquiring land for the said purposes.
- (B) The re-housing of persons of the poorer and working classes displaced by the execution of improvement schemes.

This is followed by the words "and otherwise as hereinafter appearing" which are by no means easy to construe with what precedes; they are, we think, intended to be read with the phrase "to make provision"; if this be the true meaning, the term "otherwise" may be taken as equivalent to "in other ways" or, "in other respects," or "with regard to other points" which are given in the Oxford Dictionary as significations of the word.

The second paragraph of the preamble recites the expediency of the constitution of a Board of Trustees invested with special powers to carry out the objects of the Act.

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The third paragraph of the preamble recites that sanction of the Governor-General had been obtained, under section 5 of the Indian Councils Act, 1892, to such of the provisions as affect Acts passed by the Governor-General of India in Council.

The fourth paragraph of the preamble recites that the sanction of the Governor-General had been obtained, under section 43 of the Indian Councils Act, 1861, to the enactment of the provisions of the fifth chapter which relate to Taxation.

It is worthy of special note that acquisition of land for purposes of recoupment is not specified as one of the objects of the Act, though acquisition of land for the purposes enumerated above as (a), (b), (c), (d) is expressly mentioned. The Advocate-General, with characteristic candour, conceded, that he could not support the position that acquisition of land for purposes of recoupment is one of the objects of the Act, thought it may be one of the means to attain the objects of the Act.

The Act is divided into eight chapters. Section 2, which finds a place in the first chapter, contains definitions of terms. Clause (f) lays down that, unless there is anything repugnant in the subject or context, the expression "improvement scheme" means a general improvement scheme or a street scheme or both. Clause (n) lays down that the expression "public street" has the same meaning as in clause 37 of section 3 of the Calcutta Municipal Act, 1899.

The second chapter makes provision for the constitution of the Board of Trustees, the conduct of business by them, and the appointment and status of their officers and servants.

The third chapter, which treats of improvement schemes and re-housing schemes, comprises sections 36 to 67. Sections 36 and 39 read together show that

improvement schemes are of two kinds, namely, general improvement schemes and street schemes, while section 52 shows that, in addition to these two classes of schemes, there may be re-housing schemes. We are not concerned in the case before us with either a general improvement scheme or a re-housing scheme, and we need, consequently, examine in detail only the provisions applicable to a street scheme. The first stage in a street scheme is described in section 39 which is in these terms :

“ Whenever the Board are of opinion that for the purpose of—

- (a) providing building sites, or
- (b) remedying defective ventilation, or
- (c) creating new, or improving existing means of communication and facilities for traffic, or

(d) affording better facilities for conservancy, it is expedient to lay out new streets or to alter existing streets (including bridges, causeways and culverts), the Board may pass a resolution to that effect, and shall then proceed to frame a street scheme for such area as they may think fit” The first step in a street scheme is, consequently, taken when the Board passes a resolution that it is expedient to lay out a new street or to alter an existing street, because the Board are of opinion that such a course is requisite for one or more of the four purposes enumerated in clauses (a), (b), (c), (d) of section 39. The second stage in a street scheme is also described in section 39, namely, the second step is taken when, after the resolution has been passed, the Board proceed to frame a street scheme for such area as they may think fit. It is obvious that before the scheme can be actually framed, the area must first be determined ; such area is clearly the area which the Board, in their discretion, think should be improved by the carrying out of the purpose

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set forth in their resolution. Section 40 specifies the matters to be considered when an improvement scheme is framed in respect of an area. It is plain that when a street scheme is framed under section 40 in respect of an area previously determined upon under section 39, regard must be paid to the three points mentioned in the section, with reference to the particular purpose specified in the resolution of the Board passed under section 39. The three points specified in section 40 are :

(a) The nature and the conditions of neighbouring areas and of Calcutta as a whole : (b) the several directions in which the expansion of Calcutta appears likely to take place : and (c) the likelihood of improvement schemes being required for other parts of Calcutta.

There can be no dispute that the consideration of these matters will lead to different results according as the purpose specified in the resolution of the Board is one or other of those mentioned in section 39 ; for example, if the object be the remedying of defective ventilation, the consideration of the matters mentioned in section 40 may lead to conclusions very different from what would be reached if the purpose were the affording of better facilities for conservancy. It may also be incidentally observed that clause (a) of section 40, which renders it obligatory on the Board to pay regard to the nature and the conditions of neighbouring areas, shows that the area for which the street scheme is to be framed must have been previously determined ; it would be unmeaning otherwise to speak of "*neighbouring areas*" Sections 41 and 42 specify respectively matters which must be and which may be provided for in improvement schemes. Clause (a) of section 41 lays down that every improvement scheme shall provide for the acquisition by the Board

of any land in the area comprised in the scheme which will, in their opinion, be required for the execution of the scheme. Two points require to be noted in connection with this clause. *First*, the term "acquisition" does not necessarily mean "compulsory acquisition under the provisions of the Land Acquisition Act." This is clear from sections 68 and 69, which refer respectively to acquisition by agreement and compulsory acquisition. *Secondly*, the area comprised in the scheme is obviously larger than the land to be acquired as required for the execution of the scheme, in other words, the land required for what may be called the engineering works forms a part only of the area for which the improvement is made. Clause (b) of section 41 lays down that every improvement scheme, shall provide for the laying out or relaying out of the land in the said area, (that is, the area comprised in the scheme). There has been much discussion at the Bar as to the precise meaning of the expressions, "lay out land" and "relay out land." These expressions do not appear to have been used as words of art or technical words. The expression "lay out" is explained in the Oxford Dictionary, Vol. VI, p. 131, to mean "to plot or plan out," "to plan or map out"; "to apportion for a purpose." The expression "relay out" can be fittingly applied only to land which has been previously laid out. It is obvious that these expressions must be interpreted in view of the requirements of the particular scheme in hand, which may be a general improvement scheme undertaken for one or more reasons specified in section 36, or a street scheme undertaken on one or more of the grounds enumerated in section 39. For instance, it is conceivable that in the case contemplated in section (36) (b) (1) a large tract of land may come within the operation of a general improvement scheme which may provide for demolition of the

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buildings and for laying out the land for reconstruction of buildings. In our opinion, clause (b) of section 41 lends no support to the theory that in every improvement scheme, for whatever purpose undertaken, the entire area comprised in the scheme must be acquired and relaid, with the exception of the area actually required for the engineering works. Section 42 specifies matters which may be provided for in improvement schemes. Clause (a) lays down that any improvement scheme may provide for the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme. Three points require to be noted in connection with this clause, which is the counterpart of clause (a) of section 41. *First*, the term "acquisition", as already observed in connection with section 41(a), does not necessarily mean "compulsory acquisition"; *secondly*, the land to be acquired is smaller than the area comprised in the scheme; *thirdly*, the land must be such as will, in the opinion of the Board, be affected by the execution of the scheme. There has been much controversy at the Bar round the expression "affected." On behalf of the Trustees, the Advocate-General has maintained that the term "affected" means "beneficially affected," so that the Trustees are entitled to acquire compulsorily any land in the area comprised in the scheme, if they are of opinion that the land will be benefited by the execution of the scheme. This argument is based upon the fallacious assumption that section 42 authorises compulsory acquisition of land; as we have seen, it does nothing of the kind. But, apart from this, the question does arise, what is the meaning of the expression "affected by the execution of the scheme?" The plaintiff respondent contends that the term "affected" means "injuriously or prejudicially affected." The

appellants contend, on the other hand, that the term signifies "beneficially affected." There can be no doubt that the term "affected" taken by itself is colourless and is equivalent to "acted upon"; but, as pointed out in the Century Dictionary, the word is generally used to convey the sense of "acted upon or influenced injuriously"; for instance, if one were to say that "his health has been affected by the climate of India," the obvious meaning would be that "his health had been impaired and not improved." In our opinion, the word "affected" is a word capable of a very large meaning, a word not of art but of ordinary English, which must be interpreted with reference to the context. We think that in section 42 it means neither "beneficially affected or improved in value" nor "prejudicially affected or impaired in value," but signifies "acted upon physically or materially." This, in fact, is one of the recognised meanings given in the Oxford Dictionary, Vol. I, p. 153. There is an instructive discussion of the meaning of the term "affected" in the case of *Metropolitan Board of Works v. McCarthy* (1) to which reference may usefully be made in this connection. Land may well be said to be "affected by the execution of a scheme" within the meaning of section 42 (a), when, by the construction of the improvement works, there is a physical interference with any right, public or private, which the owner is entitled to exercise in connection with that property. The interpretation suggested by the Trustees, namely, that "affected" means "beneficially affected," that is, "benefited", leads to a curious result. The expression "area comprised in the scheme" in section 42 (a) is clearly the area for the benefit of which the street scheme is made under section 39; presumably, therefore, every inch of land within the area so

(1) (1874) L. R. 7 H. L. 243.

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determined upon under section 39 will be benefited, or to use the expression coined by the appellants, "beneficially affected" by the execution of the scheme. How can it then be appropriately said, as section 42(a) does, that the Board may select for acquisition such land only in the area comprised in the scheme as will, in their opinion, be affected by the execution of the scheme. The contention of the appellants practically is that the Trustees can acquire any or all land in the area, for the whole area would be benefited by the scheme. We are clearly of opinion that we should not adopt this forced and unnatural construction put forward by the appellants. The effect of that interpretation is that under section 39, the Board may, in the first instance, arbitrarily fix the area which, in their opinion, will be benefited by the proposed improvement scheme, and then proceed, under section 42(a), equally arbitrarily, to take away all land within such area from private owners on the plea that the lands will be benefited by the execution of the contemplated improvement scheme. On the other hand, the section is at best an enabling provision; it gives no power of compulsory acquisition, though it may possibly authorise the Board to acquire land by private agreement. The interpretation we adopt, puts a reasonable construction upon the section; it limits the application of the provision to cases of all lands within the area of the scheme, where by the execution of the scheme, that is, by the construction of the improvement works, the lands will be affected, that is, in respect of those lands, there will be a physical interference with a right, public or private, which the owner is entitled to exercise in connection therewith. The reason for such a provision is not far to seek. Although the provisions of the Land Acquisition Act have been materially modified in various particulars

in their application to cases of acquisition of land for the purposes of the Trust, clauses (3) and (4) of section 23 (1) have been left untouched. Consequently, in cases of acquisition for the Trust, as in all other cases, the owner of the land acquired is entitled to damages for what are compendiously described as "severance" and "injurious affection." The Board are placed in a position to escape from the payment of such damages by section 42 by including in their scheme the lands which will be affected by the execution of the scheme. It is obvious that when a reasonable interpretation of section 42 is possible, we should not adopt the construction suggested by the Trustees, which is not only not in accordance with the plain and natural meaning of the words used by the Legislature, but will also result in vesting the Board with arbitrary and unlimited powers of interference with private rights.

Section 43 describes the procedure for preparation and publication of notice as to the improvement scheme and its transmission to the Chairman of the Calcutta Municipal Corporation and of other Municipalities. Section 44 provides for submission of representations to the Board by Municipalities. Section 45 provides for service of notice on owners of land as to the proposed acquisition of their land for executing the scheme. Section 47 requires the Board to consider objections, representations and statements of dissent; the Board may then either abandon the scheme or apply to the Local Government for sanction to the scheme with such modifications, if any, as the Board may consider necessary. Section 48 authorises the Local Government to sanction, either with or without modification, or to refuse to sanction, any improvement scheme submitted to it under section 47. The first clause of section 49 requires the Local Government, when an improvement scheme has been sanctioned, to

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announce it by notification. The second clause of section 49 defines the effect of the publication of such notification in these terms: "The publication of a notification under sub-section 1, in respect of any scheme, shall be conclusive evidence that the scheme has been duly framed and sanctioned." Section 50 authorises the Board to alter a scheme after it has been sanctioned by the Local Government, and describes the mode of exercise of such power; in particular, we may note that clause (b) of the proviso requires that if the alteration involves the compulsory acquisition of further land, a fresh application has to be made to Government after compliance with the prescribed preliminaries. The remaining sections of the third chapter deal with topics which do not bear directly on the questions in controversy in the present case.

The fourth chapter deals with the subject of acquisition and disposal of lands. Sections 68 and 69 show that the acquisition may be either by agreement between the Board and the proprietor of the land or by compulsory proceedings taken at the instance of the Board under the provisions of the Land Acquisition Act, which are modified in important particulars by section 71 read with the schedule to the Act. As regards compulsory acquisition, the fundamental point to be borne in mind is that the Board is authorised, not to acquire whatever land they may choose, but only to acquire land *for carrying out any of the purposes of the Act*. This is manifest from the language used by the Legislature in section 69: "the Board may, with the previous sanction of the Local Government, acquire land under the provisions of the Land Acquisition Act, 1894, *for carrying out any of the purposes of this Act*." As has already been shown, the purposes of the Act are enumerated in the

preamble, and, consequently, in any concrete case, if the competence of the Board to compulsorily acquire a parcel of land is called in question, the test must be applied, whether the land is proposed to be acquired for carrying out one or other of the purposes of the Act. By no stretch of language can it be maintained that recoupment is one of the purposes of the Act; the Advocate-General, indeed, as previously stated, conceded this position. Consequently, the Board are not competent, *prima facie*, under section 69 to acquire land compulsorily for recoupment. An ingenious attempt, however, has been made to evade this conclusion by a forced construction of several of the provisions of the Act which we shall hereafter consider. The only other provision in the fourth chapter whereon stress has been laid by the Board is that contained in section 78. That section authorises the Board to abandon the acquisition of land in any area comprised in an improvement scheme, which is not required for the execution of the scheme; such abandonment is to be made in consideration of a sum of money which is to be paid by the owner of the land three years after the date of the agreement or is to constitute an outstanding charge on the land subject to payment of interest in perpetuity. It is plain that the provisions of section 78 are applicable, only when the land is not required for the execution of the scheme, but is yet within the area comprised in the improvement scheme as sanctioned by the Local Government. The contingency contemplated may obviously happen when the Board, under section 50, alters the scheme after it has received the sanction of the Local Government under section 48; it may well happen that land which was originally intended to be acquired as necessary for the acquisition of the scheme may turn out to be not actually required for the

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execution of the scheme by reason of an alteration in the scheme made under section 50, or it may also be by reason of some mistake in the original scheme itself. In such a contingency, section 78 comes into play. We have been invited, however, on behalf of the Trustees to hold that section 78 shows by implication that the Board are competent deliberately to include in their scheme lands which they know are not required for the execution of the scheme, solely with a view to make profit from the owner under section 78. We are clearly of opinion that there is no foundation whatever for this contention. The argument in substance is that the Board are competent to seize whatever private property they may choose and include it in their scheme, deliberately on purpose to levy contribution from the owner under section 78, though the Board are fully aware all the time that the land can never be required for the execution of the scheme. If the Legislature had intended to invest the Board with arbitrary and unlimited powers of interference with private property of this description, the object should and would have been carried out by the insertion of a clause suitably framed in that behalf. It is further clear that section 78 as interpreted by the appellants might in essence be regarded as a provision for the imposition of a tax on the subject, and should, consequently, have found a place appropriately in the fifth chapter after it had received the sanction of the Governor-General as required by section 43 of the Indian Councils Act, 1861. We do not overlook the fundamental distinction between the power of the State to acquire private property for public purposes and the power to impose a tax upon its subjects. In the former case, the property ceases to be the property of the private owner, he is awarded compensation therefor, measured by the market value

at the time of acquisition, and the loss he suffers in the prospective rise in value. In the latter case, the property continues to be the property of the private owner, but a burden is imposed upon him as his contribution to the cost of the benefit conferred upon his land by the improvement carried out in the locality. In a proceeding under section 78, if the application of the owner is refused and the land is acquired, no question of taxation properly so called arises; but it must be established beyond doubt that the Board have authority to deprive the owner of his land in this manner, that is, that the Board are competent to acquire the land under section 69 as required for carrying out one of the purposes of the Act. On the other hand, if the application of the owner under section 78 is granted and the proposed acquisition is abandoned on payment by him to the Trustees of the agreed sum or of interest thereon in perpetuity, a tax is in essence imposed on the land; the truth of the matter in this event is that a sum periodically payable is exacted out of the land, unless the capitalised value thereof is paid within the prescribed period. In this view of the true scope of section 78, we cannot hold that the section was intended to be used as a cover for the arbitrary acquisition of private property for purposes of recoupment, such recoupment to be made either by way of levy of a lump sum from the owner or a periodical tax payable out of the property, or by way of acquisition of the land for profitable resale hereafter. Reference has also been made to section 81 which authorises the Board to dispose of land vested in or acquired by them under the Act. This does not imply, however, a power in the Board to acquire land compulsorily except for carrying out one of the purposes of the Act as provided in section 69; for there may obviously be occasion for the Board to dispose of what

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may be called surplus land, that is, land not required for the execution of the scheme, under various conceivable circumstances. It is hardly necessary to enumerate exhaustively the various modes in which superfluous land may come into the hands of the Trustees, but instances will occur to every body. Thus, land originally taken under the compulsory powers, may have been taken upon a wrong estimate or calculation of the quantity of land which would be required for a purpose for which it is afterwards found out, by experience, that less land than was originally supposed will be sufficient, or, again, the Board may have been forced to take superfluous land under section 49 of the Land Acquisition Act by reason of wishing to take a part only of the premises. There may also be instances where land taken originally and required originally for a scheme may turn out to be superfluous by reason of abandonment or modification of the scheme [see instances enumerated by Lord Cairns in *Directors of G. W. Ry. Co. v. May* (1)]. Where it is thus possible to imagine cases of application of section 81, it would be wrong to infer therefrom a power of acquisition of land for purposes of recoupment. Consequently, neither in the case of section 78 nor in that of section 81, can we say that it necessarily implies a power of acquisition for recoupment; though the sections may come into operation where the power exists, the essence of the matter is that there may be occasion for their use even if the power does not exist. As Bell J. said in *Dickson v. Pape* (2), "a necessary implication is not guess, not probability, but an inference which by no reasonable intendment can be otherwise; it is a state of things excluding any reasonable conclusion but the one."

The fifth chapter deals with taxation under three

(1) (1874) L. R. 7 H. L. 283, 293. (2) (1845) 7 Ir. L. R. 107, 123.

heads, namely, a duty on transfers of property situated within the limits of the Calcutta Municipality, a terminal tax on passengers by Railway and by Inland Steam Vessels, and a Customs duty on jute exported by sea from the Port of Calcutta. It is worthy of note that there is no provision for the imposition of a tax on property in Calcutta which may receive the benefit of and be enhanced in value by the improvements effected by the Board of Trustees. On the other hand, there are indications furnished by the evidence of the Chairman of the Trust that the Secretary of State for India in Council refused to accept a proposal to impose a tax by way of what is called frontage rates. The fact remains, at any rate, that only three taxes are imposed by the provisions of the fifth chapter, and it would be against well-known rules of construction of statutes to hold that another tax has been, by implication, imposed upon the subject; the intention to impose a charge on the subject must be shown by clear and unambiguous language. [See the observations of Lord Brougham in *Stockton Ry. Co. v. Barrett* (1), referring to *Hull Dock Co. v. Browne* (2)].

The sixth chapter is devoted to Finance. Section 88 imposes an obligation upon the Calcutta Municipal Corporation to make a quarterly contribution to the funds of the Board subject to a minimum annual payment of seven and a half lakhs of rupees. Section 89 and the following sections authorise the Board to raise money by loans and to make consequential provisions for payment of interest thereon, for the institution of a sinking fund, and other like matters. The remaining sections of the chapter deal with the enforcement of liabilities, budget estimates, banking and investments and accounts. Reliance, however,

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(1) (1844) 11 Cl. & Fin. 590 ; (2) (1831) 2 Barn. & Adl. 46 ;
 65 R. R. 261. 36 R. R. 459.

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has been placed upon clauses (c) and (d) of section 122 and clause (b) of section 123 as implying an authority in the Board to obtain funds for purposes of recoupment by acquisition and resale of land. In our opinion, the sections mentioned throw no light whatever on the question in controversy. They merely contain provisions as to the mode in which the accounts are to be kept; this is clear from the circumstance that they find a place in that portion of the chapter on Finance which is headed "Accounts" and comprises sections 120 to 136. Reference may in this connection be made to clause (f) of section 122 which lays down that all lump sums received from the Government in aid of the Capital Account are to be credited to the Capital Account; obviously, this does not create a right in the Board to demand an aid from Government; if such an obligation was intended to be imposed on the Government, an appropriate section would have been inserted in the sixth chapter. This is made clear beyond dispute by reference to clauses (b) and (c) of section 124 which lay down that the proceeds of taxes imposed by the fifth chapter and the sums contributed from Municipal funds are to be credited to the Revenue Account. These provisions do not create a right in the Board to receive these sums; the right is created by sections 82, 83 and 84 in the chapter on Taxation and by section 88 in the chapter on Finance. Sections 122 to 125 merely prescribe the mode in which the accounts are to be kept; an appeal to them to show that certain rights have been created in the Board is bound to be infructuous.

The two remaining chapters comprise provisions as to the making of rules and supplemental provisions, which do not throw any light upon the matters which arise for decision in this case. We shall now proceed to determine the questions in controversy in view of

the exposition given above of the principal provisions of the Act.

The first contention advanced on behalf of the Trustees is to the effect that they were authorised by the provisions of the Act to compulsorily acquire the land in suit for purposes of recoupment. The Advocate-General has conceded that there is no provision in the Act which authorises in express terms the compulsory acquisition of land for purposes of recoupment, and he suggested with almost cynical frankness that the Legislature had perhaps deliberately refrained from inserting in the Act an express provision to this effect with a view to avoid public clamour and criticism. He would seem to suggest, however, that the Legislature had at the same time conferred the requisite authority in this behalf on the Trustees, surreptitiously as it were, by so framing some of the provisions of the Act as to leave no room for escape from the conclusion that the Trustees possess the power by necessary implication. We are emphatically of opinion that an Act of the Legislature should not be interpreted on the assumption that the Legislature has indirectly accomplished what it did not venture to undertake openly and directly. This principle applies with special force to Acts which confer on a Corporation extensive powers of interference with private rights; the extent of the right of interference must be assumed to have been explicitly and accurately defined in the Act, and we decline to hold that wider powers than what appear on the face of the Act have been conferred in disguise on the Board of Trustees. Section 69 authorises the Trustees compulsorily to acquire land *for carrying out any of the purposes of the Act*; recoupment is admittedly not one of the purposes of the Act which are outlined in unmistakable language in the preamble, and are

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formulated in detail in sections 36, 39 and 52. The conclusion follows that the Trustees have not been empowered to acquire land compulsorily for the purpose of recoupment. But it is said that the power may be spelt out of other sections of the Act. Assume that such a method of construction is admissible, what are the sections within which such a power is supposed to lie hidden? Reliance is placed on sections 41, 42, 78, 81, 122 and 123. In our opinion, none of these sections is of any real assistance to the appellants. Sections 41 and 42, as already explained, deal merely with matters which must be or may be provided for when an improvement scheme is framed; they do not, directly or indirectly, authorise the compulsory acquisition of any land. It is further clear that clause (a) of section 41 refers to the acquisition of land required for the execution of the scheme, while section 78 authorises the abandonment of land not required for the execution of the scheme. It cannot reasonably be contended that section 41 entitles the Board to include in the scheme, land not really required for its execution, on the pretence that it is so required, merely with a view to enable the Board to make a profit by subsequent abandonment under section 78. The proceedings of the Board no doubt disclose that such a course was, at one stage, seriously advocated; but, fortunately for the reputation of the Board, the good sense of the majority prevailed, and the Board escaped from what has been, not very inappropriately, described by counsel for the respondent as a process of blackmail in the shape of levy of "exemption fees." We are of opinion that section 41 (a) does not authorise compulsory acquisition of land for recoupment. Section 42 (a) also does not advance the contention of the Trustees in the least degree; that clause, as we have seen,

authorises the inclusion, in the scheme, of land which will be affected by the execution of the scheme; this refers to cases, where, by the execution of the scheme (that is, the construction of the contemplated works), there would be physical interference with any right, public or private, which the owner of the property is by law entitled to exercise in connection with such property. This clearly does not authorise the Board compulsorily to acquire any land they choose for the purpose of reconpment, on the assertion that the land is likely to be benefited by the proposed improvement and may consequently be taken away from the owner. Sections 71 and 81 also are of no avail, for, as has already been shown, they have no connection with the compulsory acquisition of land and provide merely for the abandonment of proposed acquisition of land or the disposal of land acquired under the Act. Sections 122 and 123 only regulate the mode in which the accounts are to be kept and do not sanction the compulsory acquisition of land. Section 69 accordingly remains the only section in the whole Act which deals with compulsory acquisition. There is thus no foundation whatever, in our opinion, for the contention that the Legislature had resorted to what has been called an indirect method to deprive private owners of their property, by provisions in the Act which effectively confer on the Board a disguised authority to acquire land compulsorily for purposes of reconpment. The Legislature has carefully provided for the finances of the Trustees; in addition to taxation, provision is made for Municipal contributions, loans, and possible grants from the Government; if the Legislature had intended that profit from the acquisition and resale of land should be one of the recognised methods to aid the finances of the Trust, an express provision framed in suitable language would, no doubt,

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have found a place in the fifth or sixth chapter. In the absence of such a provision, we must decline to read into the Act a clause of this character. It is well known that in the case of similar statutes in England, the land which the Corporation is authorised to acquire compulsorily is definitely set out either in a schedule to the Act or in a Book of Reference and Plans, and even then the Corporation may only acquire what is necessary for the purposes of the Act. It does not seem probable that in the case of the Calcutta Improvement Act, the Trustees were by implication invested with unlimited authority compulsorily to acquire whatever land they might choose,—not for the purpose of execution of the scheme itself, but for the purpose of recoupment. Such interference with private rights is, it is indisputable, permissible only under statutory authority. The statute which is the source of the authority of the Trustees, does not, in express terms, confer such powers on them, nor does it do so by obvious and necessary implication. It may not be unprofitable to consider for a moment, what is the real position if the contention of the appellants is sound. The Local Government are not entitled as such to interfere with private rights; so the State, in its legislative capacity, creates a Board of Trustees, and through them invests the Local Government with unlimited authority and unfettered discretion to interfere with private property; and it is seriously suggested that this result has been achieved by provisions in disguise, with a view to avoid criticism and comment, which, it is said, would have been inevitably evoked by an explicit provision for this purpose. Now, it need not be disputed that the Legislature has, in times of peace, no less than in times of war, invested the executive authorities with extensive powers of interference with private rights; instances will readily

occur to all familiar with modern legislation [*King v. Halliday* (1) which arose in connection with the Defence of the Realm Act, 1914, and *Ezra v. Secretary of State* (2) which arose in connection with section 6 (3) of the Land Acquisition Act whereby a declaration by the Local Government that land is needed for a public purpose is made conclusive evidence of the existence of such purpose]. In all such instances, however, where unlimited powers of interference are intended to be conferred on the executive authorities, the statute puts the matter plainly and beyond dispute. In this connection, reference may usefully be made to the principle, repeatedly recognised in a great variety of cases, that where the objects of the statute do not obviously imply such an intention, it must be presumed that the Legislature does not desire to confiscate the property or to encroach upon the rights of persons; it is expected that if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt: *Western Counties Ry. Co. v. Windsor and Annapolis Ry. Co.* (3) *Commissioner of Public Works v. Logan* (4), *Green v. The Queen* (5), *Sowerby v. Smith* (6), *Wells v. London Ry. Co.* (7), *Commissioner of Sewers of the City of London v. Glasse* (8), *Exp. Jones* (9), *Randolph v. Milman* (10), *Randall v. Blair* (11), *Duke of Devonshire v. O'Connor* (12). In these circumstances, we are not prepared to accept an interpretation of the Calcutta Improvement Act which is not the natural construction of its provisions

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(1) [1916] 1 K. B. 738.

(2) (1905) 1 L. R. 32 Calc. 605 ;
 L. R. 32 I. A. 93.

(3) (1882) 7 A. C. 178, 188.

(4) [1903] A. C. 355.

(5) (1876) 1 A. C. 513.

(6) (1874) L. R. 9 C. P. 524.

(7) (1877) 5 Ch. D. 126, 130.

(8) (1872) L. R. 7 Ch. App. 456.

(9) (1875) L. R. 10 Ch. App. 663.

(10) (1868) L. R. 4 C. P. 107, 113.

(11) (1890) 45 Ch. D. 139.

(12) (1890) 24 Q. B. D. 468, 473.

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and which involves the consequence that an unlimited right of interference with private rights for purposes of recoupment has been conferred upon the Trustees by means of provisions which do not directly at least disclose such an object. We hold accordingly that the Act does not authorise the Board of Trustees to acquire land compulsorily for purposes of recoupment.

The second contention put forward on behalf of the appellants is that the lands in suit are required for providing "building sites" within the meaning of section 39 (a) and are consequently liable to be compulsorily acquired. The plaintiff respondent answers that this plea is an after-thought and that there is no foundation for it either in law or in fact. We are of opinion that the contention of the appellants cannot possibly prevail. There is no room for controversy that the improvement scheme was initiated, not for the purpose of providing building sites under section 39 (a), but for improving existing means of communication and facilities for traffic under section 39 (c). This is clear from the resolution of the Board passed on the 27th August 1912 under section 39 in the following terms: "The Board are of opinion, after local inspection, that the Russa Road between Elgin Road and Hazra Road is too narrow to afford proper facilities for traffic and should be altered by being widened, and, therefore, resolve that a street scheme be prepared to effect such widening." As already explained, the initial step in the assumption of jurisdiction by the Board is the passing of the resolution under section 39; it is obviously not a matter of form but of substance. We are surprised that in the case of a public Corporation when action has been taken under the statute on one basis, an attempt should be made to justify that action as if it had been taken for an entirely different

purpose. The scheme before us, as we know, was not initiated, because the Board were of opinion that for the purpose of providing building sites, it was expedient to alter an existing street, namely, the Russa Road between the points where it is intersected by the Elgin Road and the Hazra Road, respectively. It is patent that there is a fundamental difference between providing building sites and improving existing facilities for traffic. It is not competent to the Board to initiate a scheme on one of the grounds enumerated in section 39 and then to justify their action on the plea that the scheme might have been framed on the other grounds; such evasion of compliance with statutory requirements is not permissible. It is further clear from the resolution of the Board passed on the 17th September 1912 that the scheme was "to provide only for the widening of Russa Road and the taking up for recoupment purposes land unoccupied or occupied by buildings of small value." There was no assertion that the widening of Russa Road and the acquisition of lands on both sides thereof (though the road was to be extended on the western side alone) were necessary for providing building sites, although it was faintly suggested in the scheme outlined for the information of the public (Ex. 1, page 6, H. 2—5) that the land abutting on the widened road should be laid out in suitable building sites. It was only when doubts were raised as to the competence of the Board to take up land compulsorily for purposes of recoupment that the Board and their advisers found it convenient to rely upon the theory that the land in suit was required for providing building sites. The obvious answer is that that was not the purpose of the scheme. The respondent has also contended with considerable force that even if this were not so, even

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if it were competent to the Board to initiate a scheme for one purpose and then proceed therewith as if it were undertaken for a different purpose, still there is no question of providing a building site here. The land in suit is a good building site, a new building has been erected on a part of the premises and the remainder was about to be used in the same manner. It is plain that "providing building site" under section 39 (a) does not mean buying up land already fit for building site or pulling down houses and selling the land for building site; in our opinion, it means making it possible to use as building site land which cannot for various reasons be now used as building site. In these circumstances, the plaintiff urges with good reason that it is not competent to the Board to seize his building site and resell it at a profit on the pretence of providing a building site. There is little room for doubt that if the Board were permitted to take such a step under colour of statutory provisions, it would be an abuse of those provisions on the plea of nominal compliance therewith. We may observe incidentally that when the Board proceeded to frame the scheme after their resolution under section 39, they did not determine the area for which the scheme was to be framed; they merely determined the land which, they thought, should be acquired, and overlooked that the land to be acquired, though included in the area for which the street scheme is framed, is not conterminous therewith; the area for the benefit of which the scheme is framed is plainly more extensive than the land required for the execution of the scheme. In our opinion, the assertion that the land in suit is required for providing building site, furnishes no answer to the claim of the plaintiff.

The third contention of the appellants is that the

lands in suit are required for the purpose of lay out and are consequently proper subject-matter of compulsory acquisition. Reliance is placed upon section 41 (b) which requires that every improvement scheme shall provide for the laying out or relaying out of the land "in the said area," that is, in the area comprised in the scheme. Reference is also made to the decisions in *Baker v. Mayor of Portsmouth* (1), *Galloway v. Mayor of London* (2), *Hendon Local Board v. Pounce* (3), to show that the word "street" includes the roadway as also the houses on both sides. In our opinion, this contention of the appellants must be deemed groundless for more than one reason. *First*, it is plain, that section 41 (b) does not directly or indirectly relate to the acquisition of any land whether by private agreement or by compulsory process. *Secondly*, what is called "lay out" is not one of the objects of the Act as enumerated in the preamble, nor even one of the purposes mentioned in section 39 for which a street scheme may be undertaken. *Thirdly*, the contention, if well founded, proves too much, for as section 41 (b) requires that every improvement scheme shall provide for the laying out of the land in the area comprised in the scheme, according to the view maintained by the appellants the entire land included in the area determined as the area to be benefited under section 39 must be acquired and laid out or relaid out as the case may be. *Fourthly*, a reference to the interpretation of the term "street" in the Local Government Act, 1858, can serve no useful purpose and can be of no real assistance in the determination of the meaning of the term "street" in the Calcutta Improvement Act, 1911. Section 2 (n) shows that the expression "public

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(1) (1878) 3 Ex. D. 157.

(2) (1866) L. R. 1 H. L. 34, 55.

(3) (1889) 42 Ch. D. 602.

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street" has the same meaning as in section 3 (37) of the Calcutta Municipal Act, 1899; according to that definition the term "street" does not include either the abutting lands on both sides or the houses thereon. Section 41 (b) only contemplates that the scheme shall provide for the lay out or relay out of such land in the area comprised in the scheme as may be validly acquired by or become otherwise vested in the Board. The section does not imply an obligation on the Board and corresponding authority on their part to acquire compulsorily all the lands situated in the area comprised in the scheme.

The fourth contention of the appellants is to the effect that as the lands in suit will be "affected" by the execution of the scheme within the meaning of section 42 (a), they have been properly included for compulsory acquisition by the Trustees. There is no force in this argument; indeed, the proceedings of the Board and the course of this litigation show that this is a rather belated argument ingeniously devised to meet the exigencies of the situation. First, section 42 (a) does not authorise the compulsory acquisition of any land. Secondly, these lands will in no way be "affected by the execution of the scheme," in the sense in which we interpret that expression. It is not disputed that the lands will lie a considerable way to the west of the widened Russa Road, and if they can be the proper subject-matter of compulsory acquisition, there is no conceivable reason why lands even much further to the west should not be similarly acquired; indeed, it is difficult to imagine where a line could be drawn, because all improvement schemes may in one sense be supposed to increase the value of all land in the city. There is this further difficulty in the present case that the Board did not, as we have already shown, determine under section 39 the area

for the benefit of which the street scheme was to be undertaken; they have simply selected the lands which they desired to acquire. In our opinion, section 42 is of no assistance to the appellants.

The fifth contention of the appellants raises the question of the competence of the Civil Court to entertain this suit and to grant relief by way of injunction. Reliance has been placed upon section 49 (2) which provides that the publication of a notification under sub-section (1) that the Local Government has sanctioned a scheme shall be conclusive evidence that the scheme has been duly framed and sanctioned. The argument in substance is that this section deprives the Civil Court of jurisdiction to determine whether the action of the Board is or is not *ultra vires*. In our opinion, this contention is entirely groundless. Section 49 (2) merely provides that after the publication of notification of sanction, the scheme cannot be impeached on the ground that it has not been framed and sanctioned duly, that is, in conformity with the procedure prescribed by the Act, but there is nothing in the section which takes away the jurisdiction of the Civil Court to investigate whether the action taken by the Trustees has or has not been in excess or violation of statutory authority. This follows from a plain reading of section 49 and is confirmed by sections 155 and 160, which would be entirely superfluous if section 49 (2) completely barred suits of all description in the Civil Court. This contention, consequently, must be overruled.

We may add that an objection was taken in the trial Court that the suit was barred as no notice had been given under section 156. This was overruled on the principle explained by Woodroffe J. in *Ganoda v. Nalini* (1), namely, that a section which bars a

(1) (1908) I. L. R. 36 Calc. 28.

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suit for an act done, does not prohibit a suit for an injunction to restrain the commission of an act not done but threatened to be done. The correctness of this view has not been questioned in this Court, and the point, indeed, was not even so much as mentioned in the course of argument.

It may finally be observed that in the course of the elaborate arguments addressed to us on both sides, reference was made to judicial pronouncements upon the construction of other statutes. Thus, the appellants relied upon the decisions in *Galloway v. Mayor of London* (1), *Lynch v. Commissioners of the City of London* (2), *Quinton v. Corporation of Bristol* (3), *Rolls v. School Board of London* (4) and *North London Railway Co. v. Metropolitan Board of Works* (5), to show that authority had been conferred upon them to acquire land compulsorily for recoupment. The respondents, on the other hand, relied strongly upon the cases of *Thomas v. Daw* (6), *Gird v. Commissioners of Sewers of London* (7), *Donaldson v. Mayor of South Shields Corporation* (8), and *Denman & Co. v. Westminster Corporation* (9) as laying down principles which supported their view of the matter. No useful purpose is likely to be served by an analysis of these decisions and of the special provisions of the statutes interpreted therein. It is at no time a profitable task to seek to interpret one statute by reference to another statute which, however analogous in scope, is still couched in different terms and possibly constitutes a machinery of an entirely different type to effectuate its purposes.

(1) (1866) L. R. 1 H. L. 34, 55.

(2) (1886) 32 Ch. D. 72.

(3) (1874) L. R. 17 Eq. 524.

(4) (1884) 27 Ch. D. 639.

(5) (1889) 28 L. J. Ch. 909.

(6) (1866) L. R. 2 Ch. App. 1.

(7) (1885) 28 Ch. D. 486.

(8) (1899) 79 L. T. 685 ;
 68 L. J. Ch. 102.

(9) [1906] 1 Ch. 464.

We may in this connection bear in mind the weighty warning given by Lord Haldane in *Kréglinger v. New Patagonia Meat Co.* (1), against the abuse of judicial precedents; they are of binding force and of real guidance only in so far as they establish principles. What then are the true principles applicable to cases of this character; they will be found succinctly stated in paragraph 26 of the title on "Compulsory purchase of land and compensation" contributed by Lord Alverstone and Mr. Allan to the *Laws of England*, edited by Lord Halsbury (Vol. 6, p. 25).

"Municipal and other public bodies are sometimes given powers to take land beyond that which is necessary for the actual execution of the proposed works, in order that some part at least of the improved value of the adjoining lands may be secured in ease of the burden upon the rate-payers. These lands are said to be authorised to be taken for the purpose of "recoupment," as the public body is empowered to sell or lease them at what may be an enhanced value: *Galloway v. London Corporation* (2), *Quinton v. Bristol Corporation* (3). Similarly, public bodies may be allowed to acquire land which they may exchange for other land in order to carry out the intended object more effectually or economically: *Rolls v. London School Board* (4). If the Act clearly authorises the land to be taken for the actual works only, a local authority or other public body will be restrained from taking more than is actually necessary for such works: *Donaldson v. Mayor of South Shields Corporation* (5). But if it appears that it is the intention of the Act that the public body are to be allowed to reimburse themselves, they will then be at liberty to

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(1) [1914] A. C. 25, 40.

(4) (1884) 27 Ch. D. 639.

(2) (1866) L. R. 1 H. L. 34, 55.

(5) (1899) 79 L. T. 685;

(3) (1874) 17 Eq. 524.

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take all the lands delineated on the plans. On the other hand, when local authorities are authorised to take lands from time to time for specific works, such as street widening, and the land is not specified in the Act, they cannot, in order by resale to reduce the expense to the rate-payers, take more than is *bonâ fide* necessary for the purpose: *Denman v. Westminster Corporation* (1), *Fernley v. Limehouse Board of Works* (2)."

The substance of the matter, then, is that the object of the Legislature must be determined as expressed in the provisions of the statute; it is not permissible to speculate about the expressed intentions of the Legislature; nor are we concerned with the difficulties, real or imaginary, which may arise from the adoption of the expressed intentions of the Legislature. We have, from this point of view, analysed and examined in detail the provisions of the Act which is the sole source of authority of the Trustees, and we see no escape from the conclusion that under the powers of compulsory acquisition defined in section 69, they are not competent to acquire land compulsorily except "for carrying out any of the purposes of the Act," which do not include recoupment. It is of no avail to refer to decisions on English statutes where the Legislature accurately defines the land liable to fall within the operations of the improvement authorities. It is remarkable that even under such conditions, Lindley, M. R., speaking on behalf of the Court of Appeal, did not hesitate to hold in *Donaldson v. Mayor of South Shields Corporation* (3) that although the lands in dispute were included in the book of reference, which formed in essence a part of the Act, still, he had failed, after the most dexterous

(1) [1906] 1 Ch. 464.

(2) (1899) 68 L. J. Ch. 344.

(3) (1899) 79 L. T. 685 ; 68 L. J. Ch. 102.

manipulation of the sections, to extract from them anything like an enactment to the effect that the Corporation was at liberty to take lands simply for the purpose of enabling them to raise money, lands which they did not want for widening streets and for engineering purposes. Much stress was naturally laid before him on the decision of the House of Lords in *Galloway v. Mayor of London* (1), but the Master of the Rolls disposed of this argument in his characteristic way as follows: "If you have to construe a document which will not do what you want, see if you can not find an authority which will." We may add that at the close of the arguments addressed to us, mention was made of the decision of Greaves J. in *Moni Lal Singh v. Trustees for the Improvement of Calcutta* (2). From a perusal of that judgment it is plain that fundamentally important points of view, which have been placed before us, were not laid before the Court in that case. A question may also possibly arise, whether, upon the special facts of that case, the actual decision may not be supported, apart from the reasons assigned, in support thereof. But it would clearly be not fair to express an opinion upon the judgment in that case which is not binding upon us and may possibly form the subject of an appeal.

We hold, for the reasons given above, that the decree made by the Subordinate Judge is correct and that this appeal must be dismissed with costs.

S. K. B.

Appeal dismissed.

(1) (1866) L. R. 1 H. L. 34, 55.

(2) (1916) Original Suit No. 1253
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APPELLATE CIVIL.

Before N. R. Chatterjea and Richardson JJ.

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Mosque Property. suit for—Leave of Court—Civil Procedure Code (Act V of 1908) O. I., r. 8—Failure to obtain permission before institution of the suit—Its effect—Objection for want of such permission, if fatal to the suit.

There is no doubt that the proper course is to obtain permission under Order I, rule 8 before the suit is instituted, but there is nothing in the rule to show that if it is not so done, it cannot be granted afterwards. The mere fact that the leave of the Court was not obtained before the institution of the suit should not result in the dismissal of the suit.

Permission under Order I, rule 8 can be granted subsequent to the filing of the suit.

The objection under s. 30 of the old Civil Procedure Code which corresponds with Order I, rule 8 of the present Code, is not one affecting the jurisdiction of the Court.

Fernandez v. Rodrigues (1), *Chennu Menon v. Krishnan* (2), *Srinivasa Chariar v. Raghava Chariar* (3), *Baldeo Bharthi v. Bir Gir* (4) followed.

Jan Ali v. Ram Nath Mundul (5), *Lutifunissa Bibi v. Nazirun Bibi* (6) referred to.

Oriental Bank Corporation v. Gobind Lall (7) dissented from.

Dhunput Singh v. Faresh Nath Singh (8) distinguished.

* Appeal from Appellate Decree, No. 2975 of 1914, against the decree of R. E. Jack, Additional District Judge of Chittagong, dated June 6, 1914, reversing the decree of Rash Behari Barman, Munsif of Chittagong, dated June 23, 1913.

(1) (1897) I. L. R. 21 Bom. 784.

(2) (1901) I. L. R. 25 Mad. 399.

(3) (1897) I. L. R. 23 Mad. 28.

(4) (1900) I. L. R. 22 All. 269.

(5) (1881) I. L. R. 8 Calc. 32.

(6) (1884) I. L. R. 11 Calc. 33.

(7) (1883) I. L. R. 9 Calc. 604.

(8) (1893) I. L. R. 21 Calc. 180.

THIS appeal arises out of a suit brought by the plaintiff for a declaration that the land described in schedule 2 to the plaint is a mosque property and as such is inalienable, and that the alienation is void and for possession of the land on behalf of the mosque. It was alleged in the plaint that a mosque was established a century ago for the use of the Mahomedans at mauza Sola Shahar and was still in existence; that the Mahomedan public used to offer prayers in the mosque which was known as *Khairati Masjid*; that there was endowed property for the maintenance of the mosque and that the property was managed by the plaintiff's predecessor; that the Government wanted to resume the property which was rent-free and attempted to assess rent and there was litigation which resulted in the release of the property on the 18th of February 1868; that the profits of the property were so long used for the maintenance of the mosque; that the property belonged to the mosque and no one had any personal interest therein; that the defendants 2, 3, 4 and 5 recently sold the lands to defendant No. I; that the defendants had no individual right in the property and had no power to do so; and that the defendant No. I has acquired no right by his purchase.

On the 19th August 1912, the plaintiff made a petition for amendment of the plaint and the amendment was allowed, making the application a part of the plaint. The defendant No. I traversed almost all the allegations made in the plaint and submitted that the suit was not maintainable without the sanction from the District Judge or some such officer authorised to grant such sanction, that the plaintiff was thus estopped from bringing the suit; that the plaintiff was a mere benamidar; that the suit was not within that Court.

After the amendment of the plaint was allowed, the defendant filed an additional written statement

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urging, *inter alia*, that the suit was not maintainable as previous to the institution of the suit the plaintiff did not take permission under Order I, rule 8 of Civil Procedure; that the suit was not maintainable without permission of the Advocate-General and that the suit was not a *bonâ fide* one.

The learned Munsif decreed the suit in part overruling the objection of defendant No. I that the suit was not maintainable. On appeal, the District Judge dismissed the suit on the ground that permission under Order I, rule 8 of the Civil Procedure Code had not been obtained before the institution of the suit.

Hence the plaintiff's appeal to this Court.

Maulvi Fazlul Huq, for the appellant, contended that sanction of the Advocate-General was not necessary in the present case as the suit did not fall under section 92 of the Code of Civil Procedure. This was a case under section 99 of the Code of Civil Procedure. This was a suit brought under section 30 of the old and Order I, rule 8 of the Present Code. I applied for leave and also for amendment after the institution of the suit.

The view held by the Calcutta High Court in *Oriental Bank Corporation v. Gobiind Lall Seal* (1), is apparently against me, but the cases in the other High Courts are all in my favour: *Fernandez v. Rodrigues* (2), *Baldeo Bharthi v. Bir Gir* (3), *Chennu Menon v. Krishnan* (4) and *Srinivasa Chariar v. Raghava Chariar* (5).

Babu Dharendra Lal Kastgir (with him *Babu Tarakeswa Nath Mitra*), for the respondent, submitted that leave of the Court under s. 30 (O. I, rule 8)

(1) (1883) I. L. R. 9 Calc. 604.

(3) (1900) I. L. R. 22 All. 269.

(2) (1897) I. L. R. 21 Bom. 784.

(4) (1901) I. L. R. 25 Mad. 399.

(5) (1897) I. L. R. 23 Mad. 28.

must be obtained before the institution of the suit. The Calcutta High Court has always taken that view. *Oriental Bank Corporation v. Gobind Lall Seal* (1), *Geereeballa Dabee v. Chunder Kant Mookerjee* (2), *Dhunput Singh v. Paresh Nath Singh* (3), *Lutifunnissa v. Nazirun* (4), *Jan Ali v. Ram Nath Mundul* (5). *Oriental Bank Corporation v. Gobind Lall Seal* (1) lays down that such leave cannot be granted at the hearing. Opposite view has been taken by the other High Courts, but the Bombay Full Bench Case [*Hernandez v. Rodrigues* (6)] says that section 30 implies that permission should be given before the institution of the suit. But it adds that as it is a question analogous to that of adding parties, the defect can be remedied subsequently. The other cases are based on his case. This is not a case of adding parties. Here is a question of jurisdiction and this view has been taken by the Calcutta High Court. The other High Courts have looked upon this question as one of mere irregularity which could be cured by subsequent permission. But it is really a question of jurisdiction and therefore leave cannot be given subsequent to the institution of the suit.

In the case of endowed properties, suits can be brought either under Act XX of 1863 or under the Civil Procedure, sections 30 and 539. Previous sanction of the Court is necessary if the suit is brought under Act XX or section 30.

Section 42 of the Specific Relief Act is also a bar to the present suit. The plaintiff does not pray for the appointment of a mutawalli. The decree of the 1st Court is incapable of execution as the *musjid* is not a juridical person. The lower Appellate Court has

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(1) (1883) I. L. R. 9 Calc. 604.

(4) (1884) I. L. R. 11 Calc. 33.

(2) (1885) I. L. R. 11 Calc. 213.

(5) (1881) I. L. R. 8 Calc. 32.

(3) (1893) I. L. R. 21 Calc. 180

(6) (1897) I. L. R. 21 Bom. 784.

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dismissed the suit on the preliminary ground that the suit is not maintainable under section 30. There are other questions involved in the suit which have not been decided by the lower Appellate Court. If this Court holds that leave under section 30 can be subsequently granted the case should go back for decision on other questions.

N. R. CHATTERJEA AND RICHARDSON JJ. This appeal arises out of a suit for a declaration that the property described in Schedule II of the plaint is mosque property and is inalienable, that the alienation of the same by the defendants Nos. 2 to 5 in favour of the defendant No. 1 is invalid and for a decree, that possession of the said property be restored to the mosque. The suit was instituted on the 31st May 1912 and, after the written statement had been filed by the defendant No. 1 on the 26th July 1912, the plaintiff made an application for amendment of the plaint on the 19th August 1912. In that application it was stated that the plaintiff was an heir of one of the original *sarbarakars* and was along with other persons interested in the maintenance of the mosque, and permission of the Court to sue on behalf of all the persons interested was prayed for under Order I, rule 8 of the Civil Procedure Code. The defendant No. 1 in his additional written statement pleaded that the plaint ought to be rejected as no permission had been obtained and no steps had been taken for service of notice previous to the filing of the suit. The Court of first instance overruled the said objection of the defendant No. 1 and, on the merits found in favour of the plaintiff and partly decreed the suit on the 23rd June 1913. On appeal, the learned District Judge dismissed the suit on the ground that the permission under Order I, rule 8 of the Civil Procedure Code

had not been obtained before the institution of the suit. The plaintiff has appealed to this Court.

There is no doubt that in this case permission of the Court was obtained by the plaintiff and the notice required by rule 8 of Order I was served upon the interested persons. The only question is whether the lower Appellate Court was justified in dismissing the suit on the ground that no permission was obtained at the time the suit was originally instituted. Order I, rule 8 of the Civil Procedure Code lays down that where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued or may defend, in such suit, on behalf of or for the benefit of all persons so interested, but the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons. There is no doubt that the proper course is to obtain the permission before the suit is instituted; but there is nothing in the rule to show that, if it is not so done at that time, the permission cannot be granted afterwards. The question is not one of jurisdiction and there are no imperative or prohibitory words in the rule indicating that the suit must be dismissed if the leave of the Court is not obtained before the plaint is filed. The provisions of the rule making it necessary to obtain the permission of the Court and to serve notice upon the persons interested must be complied with before the suit can proceed; but, where this is done, the mere fact that the leave of the Court was not obtained *before* the institution of the suit should not, we think, result in the dismissal of the suit. The view we take is supported by the Full Bench decision of the Bombay High Court in the case of *Fernandez v. Rodrigues* (1). There it was held that

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the permission might, according to the old Chancery practice in England, be given at any time; that the matter involved no question of jurisdiction and was analogous to that of adding parties. The Madras High Court also has held that the leave to sue under section 30 of the old Code of Civil Procedure may be given after the commencement of the suit: see *Chennu Menon v. Krishnan* (1) and *Srinivasa Chariar v. Raghava Chariar* (2). The same view has been taken by the Allahabad High Court in the case of *Baldeo Bharti v. Bir Gir* (3). The cases in our Court on the point are *Jan Ali v. Ram Nath Mundul* (4), *The Oriental Bank Corporation v. Gobind Lal Seal* (5) and *Lutifunnissa Bibi v. Nazirun Bibi* (6). In these cases it has been held that the plaintiff is not entitled to institute a suit without obtaining leave under section 30 of the old Code of Civil Procedure. But in none of these cases except the case of the *Oriental Bank Corporation v. Gobind Lal Seal* (7), was leave applied for or obtained at all. The question therefore whether leave can be granted subsequent to the institution of the suit did not arise nor was decided in those cases. As already stated there can be no doubt that leave of the Court must be obtained and the requirements of section 30 of the old Code corresponding to Order I rule 8 of the new Code must be complied with before a suit of this nature can be proceeded with, and unless that is done, the suit must be dismissed. In the case of the *Oriental Bank Corporation v. Gobind Lal Seal* (7), however, leave was applied for subsequent to the institution of the suit and was refused; and that is the only case in this Court in

(1) (1901) I. L. R. 25 Mad. 399.

(4) (1881) I. L. R. 8 Calc. 32.

(2) (1897) I. L. R. 23 Mad. 28.

(5) (1883) I. L. R. 9 Calc. 604.

(3) (1900) I. L. R. 22 All. 269.

(6) (1884) I. L. R. 11 Calc. 33.

(7) (1883) I. L. R. 9 Calc. 604.

which it has been decided that leave cannot be granted subsequent to the filing of the plaint. The learned Judge (Mr. Justice Norris) who decided that case refused leave on the ground that he had not the power to grant permission at that stage. It was the decision of a single Judge and, although the opinion of the Judge is entitled to respectful consideration, we are not bound by it. It must be observed that in that case permission was applied for at the hearing of the suit and not before. We have been referred by the learned vakil for the respondents to a passage in the case of *Dhunput Singh v. Paresh Nath Singh* (1) in which it is stated that the decisions of this Court lay down that the leave of the Court under section 30 of the old Code must be obtained before the institution of the suit and cannot be granted subsequently. This question, however, was not raised in that case, the only question raised being whether the permission under section 30 must be express or might be implied from the circumstances, and the cases of this Court, as we have seen with the exception of *The Oriental Bank Corporation v. Gobind Lall Seal* (2), did not decide the question whether leave could be granted subsequent to the institution of the suit as no such question was raised in those cases. In the present case, leave was applied for and obtained long before the hearing and the requirements of the rule were complied with. We may in this connection refer to the case of *Geereeballa Dabee v. Chunder Kant Mookerjee* (3), in which Mr. Justice Wilson in delivering judgment stated that he was of opinion that "the technical objection to the suit was a valid one, the suit being one purporting to be brought under section 30 of the Code and, as such, only permissible when leave to sue in

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(1) (1893) I. L. R. 21 Calc. 180. (2) (1883) I. L. R. 9 Calc. 604.

(3) (1885) I. L. R. 11 Calc. 213.

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that way had been obtained;" and he, therefore, dismissed the suit on that ground stating, however, that "he would have been unwilling to dismiss the suit on such a ground if he had thought that there was any substance in the plaintiff's case; but as Mr. Pugh had rested his case on the pleadings and had called no evidence, there was no ground for thinking that the suit was a substantial one." That shows that, in the opinion of the learned Judge, the objection based on section 30 was not one affecting the jurisdiction of the Court. Having regard to the absence of any prohibitory or imperative words in Order I, rule 8 of the Civil Procedure Code and the weight of authorities on the point, we respectfully differ from the view taken in the case of *Oriental Bank Corporation v. Gobind Lall Seal* (1) and hold that leave can be granted under Order I, rule 8 of the Civil Procedure Code subsequent to the filing of the suit.

It is contended on behalf of the respondents that it is a case of a public, religious and charitable trust and the case, therefore, falls under section 92 of the Code of the Civil Procedure and that the sanction of the Advocate-General ought to have been obtained before the suit was instituted. But these questions have not been gone into nor have the facts necessary for the determination of the questions been found by the Court of appeal below.

We are of opinion that the provisions of Order I, rule 8 of the Civil Procedure Code having been complied with, though subsequent to the filing of the plaint, the suit cannot be dismissed; and, as it has been dismissed by the learned District Judge only on the objection based on Order I, rule 8, we set aside the decree of the lower appellate Court and send back the case to that Court in order that that Court may decide

the other questions raised by the appellant in this case including the question of the validity of the decree of the Court of first instance and dispose of the case according to law. Costs will abide the result.

S. K. B.

Case remanded.

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LETTERS PATENT APPEAL.

Before Woodroffe and Chaudhuri JJ.

DWARKANATH CHAUDHURI

v.

TAFAZAR RAHAMAN SARKAR.*

1916
 May 23.

Non-occupancy Raiyat—Khamar land—Statute—Heading of Chapters—Bengal Tenancy Act (VIII of 1885), Ch. XI, s. 45 and Sch. III, C'. 1 (a).

A tenant of a khamar land is not a non-occupancy raiyat.

The heading of a chapter in a statute may be looked at for the purpose of interpreting a section in the statute.

LETTERS PATENT APPEAL by the plaintiffs, Dwarkanath Chaudhuri and others.

The appeal arose out of a suit for *khass* possession and damages brought by the plaintiffs landlords on the ground that the defendants had taken settlement of the land in suit for 5 years from the predecessor-in-interest of the plaintiffs and that the plaintiffs were entitled to re-enter on the expiration of the agreement. The defendants contended, *inter alia*, that they were occupancy *raiya*s and were not liable to ejection and that the suit was barred by limitation. The Munsif held that the defendants were non-occupancy *raiya*s and that the suit had been

* Letters Patent Appeal, No. 114 of 1915, in Appeal from Appellate Decree No. 991 of 1914.

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instituted more than six months after the expiry of the term of the lease, and as such the claim for ejectment was barred by limitation under Art. 1(a) of Schedule III of the Bengal Tenancy Act. On that finding, the suit was dismissed by the Court of first instance as regards the prayer for *khas* possession. On appeal by the plaintiffs, the District Judge held that the defendants being tenants of *khas khamar* land could not be non-occupancy *raiyyats*. He also held, agreeing with the Munsif, that they were not occupancy *raiyyats*, and he decreed the suit in its entirety. The defendants appealed. The second appeal was heard by Newbould J. sitting singly and was decreed. The decree of the Munsif was restored.

Thereupon the plaintiffs preferred this appeal under s. 15 of the Letters Patent.

Dr. Sarat Chandra Basak (with him *Babu Kumar Sankar Roy*), for the appellants. Admittedly the land was held for a fixed term of years: *Masudan Singh v. Goodar Nath Pandey* (1), *Sitanath Pandey v. Hara Narain Mahapatra* (2).

The words "non-accrual of occupancy and non-occupancy rights and" that were added in the heading of Chapter XI of the original Act by Ben. Act I of 1907, are quite clear in their meaning and effect. You cannot acquire either occupancy or non-occupancy right in *khas khamar* lands now.

A heading is part of the Act: *Eastern Counties and the London and Blackwall Railway Companies v. Marriage* (3).

Chapter VI of the Act deals with non-occupancy *raiyyats*. However, if there had been any doubt, the addition of those words in the heading must remove that.

(1) (1905) 1 C. L. J. 456.

(2) (1913) 21 C. L. J. 644.

(3) (1860) 9 H. L. C. 32; 11 E. R. 639.

Clause I (a) of Schedule III is not a new addition. It was once section 45 of the Act and has been removed to the Schedule as the proper place where special limitation under the Act is dealt with. See *The Queen v. Local Government Board* (1) and *Sah Mukhun Lall Panday v. Sah Koondun Lall* (2) as authorities for the proposition that a conclusion should be arrived at on comparison of all relevant sections.

Babu Jadunath Kanjital. for the respondents. The heading of Chapter XI is not complete in itself and must be read with section 116 of the Act. The headings are only short statements of the contents of the chapters and has no meaning unless read with them. Section 116 is not exhaustive. A *raiyat*, though holding under a lease for a term of years or under a lease from year to year, may yet claim a right of occupancy, as for instance when any local custom or usage is pleaded: *vide* Bengal Tenancy Act, s. 183. Chapter V will not apply in such cases. Similarly, a non-occupancy *raiyat* does not acquire his bundle of rights under Chapter VI only. He may, for instance, do so under s. 79, which is in Chapter IX.

The defendants respondents are *raiya*s. The definition 5 (2) is in Chapter II and therefore can be applied to this case. The classification is in section 4 and is exhaustive. The defendants must come under one of the divisions, and they are non-occupancy *raiya*s. The designation may fitly be applied though rights may not be claimed under Chapter VI.

Section 45 was repealed in 1907. If it were not, it could not apply to this case, as it was in Chapter VI. Now it has a wider application without doubt, by its transference to the schedule: see *Masudan Singh*

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(1) (1882) 10 Q. B. D. 309.

(2) (1875) 24 W. R. 75 (P. C.).

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v. *Goodar Nath Pandey* (1), *Bujrangi Raut v. Mackenzie* (2) and *Ajodhya Prosad Singh v. Ram Golam Singh* (3).

WOODROFFE J. The District Judge allowed the plaintiffs' claim. On appeal to this Court, Mr. Justice Newbould held that the suit was barred by limitation under the provisions of clause 1 (a), Schedule III of the Bengal Tenancy Act. It has been found as a fact that the defendants were not in possession of the land before they entered it under their lease for five years and that the land in suit is *khas khamar* land of the plaintiffs. We must accept this finding and dispose of the appeal accordingly.

The question then is—do the defendants come within the term “non-occupancy raiyat” as mentioned in the schedule? It is admitted that if the defendants are non-occupancy *raiylats*, then the suit is barred. If this portion of the Schedule does not apply, then the general law of limitation does, and the suit is not barred. The contention that has been urged before us may be summarised thus :—

For the respondents it is contended that by the term “non-occupancy raiyat” in the schedule is meant any person who is a tenant who has not acquired or cannot acquire occupancy rights, and that as the defendants have been in possession of *khamar* lands and could not acquire occupancy rights, they must be taken to be non-occupancy *raiylats* within the meaning of this article, and accordingly six months' law of limitation applies.

On the other hand, on behalf of the appellants, it is contended that a person in the position of the defendants in occupancy of *khamar* land does not come

(1) (1905) 1 C. L. J. 456.

(2) (1901) 7 C. L. J. 475.

(3) (1908) 13 C. W. N. 661.

within this article of the Schedule, and the learned vakil relies upon the fact that section 45 of the Bengal Tenancy Act, from which the present portion of the Schedule is taken, was originally in that portion of the Tenancy Act which deals with non-occupancy *raiyat*, and it is admitted that if the section had been left where it originally was, then section 45 would not have applied to the case before us. But it is contended that by its transfer to the Schedule it is given a wider application, which on the other hand is denied. Reliance also is placed on the amendment of the heading under Chapter XI of the Bengal Tenancy Act. In that heading it has been inserted "non-accrual of occupancy and non-occupancy rights." I think we may look at this heading for the purpose of interpreting the section mentioned above, and on this it is contended on behalf of the appellants that the defendants' holding *khamar* lands are not included in the term "non-occupancy raiyat" within the Schedule. I think that this argument has force and I hold that the suit is accordingly not barred.

The decree of Mr. Justice Newbould must, therefore, be reversed and that of the District Judge restored.

The appellants are entitled to their costs in this appeal and in the appeal before Mr. Justice Newbould.

CHAUDHURI J. I agree.

S. M.

Appeal allowed.

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LETTERS PATENT APPEAL.

*Before Sanderson C. J. and Mookerjee J.*1916
May 25.

JADAB SARDAR

v.

GOBINDA CHANDRA MANDAL.*

Occupancy Holding—Non-transferable occupancy Holding—Under-raiyat—Whether fresh settlement holder required to serve notice on under-raiyat after ejectment of transferee by landlord—Notice—Bengal Tenancy Act (VIII of 1885), s. 49, cl. (b).

Where a person has obtained settlement of a holding from the superior landlord after the latter had ejected the transferee of the occupancy raiyat from the said holding as it was not transferable, he is not required to serve a notice to quit on the under-raiyat under s. 49 of the Bengal Tenancy Act in his suit for ejectment.

Nilkanta Chaki v. Ghatoo Sheikh (1) and *Budan v. Rajeswari* (2) followed.

Lal Mahomed Sarkar v. Jagir Sheikh (3), *Amirullah Mahomed v. Nazir Mahomed* (4), *Amirullah Mahomed v. Nazir Mahomed* (5) and *Raghunath Singh v. William Cox* (6) distinguished.

APPEAL under s. 15 of the Letters Patent by Jadab Sardar and another, the defendants.

The defendants Nos. 1 and 2 were under-raiyats under the defendant No. 4 who subsequently transferred his non-transferable occupancy right to the first three defendants. After that transfer the landlord settled the land with the present plaintiffs, who thereupon sued to recover possession. The defendants

* Letters Patent Appeal No. 86 of 1915 in Appeal from Appellate Decree No. 1353 of 1913.

(1) (1900) 4 C. W. N. 667.

(2) (1905) 2 C. L. J. 570.

(3) (1909) 13 C. W. N. 913.

(4) (1904) I. L. R. 31 Calc. 932.

(5) (1905) I. L. R. 34 Calc. 104.

(6) (1914) 19 C. W. N. 263.

Nos. 1 and 2 who were originally under-raiyats urged that they were entitled to a notice under section 49 of the Bengal Tenancy Act. On the 29th February 1912 Babu Gopeswar Banerji, Munsif of Basirhat, decreed the suit on contest against defendants Nos. 1 and 2, and *ex parte* against defendants Nos. 3 and 4. On the 23rd January 1913, Mr. H. Walmsley, District Judge of the 24 Perganas, dismissed the appeal preferred by the defendants Nos. 1 and 2 who thereupon appealed to the High Court. On the 30th April, Fletcher J. dismissed this second appeal whereupon the defendants Nos. 1 and 2 filed a further appeal in the High Court under section 15 of the Letters Patent.

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Dr. Dwarka Nath Mitter (with him *Babu Debendra Nath Mandal* for *Babu Baikunta Nath Mitter*), for the appellants. The plaintiffs' suit for ejectment was not maintainable, inasmuch as no notice to quit under section 49, clause (b) of the Bengal Tenancy Act was served upon the defendants. The defendants, though holding under a lease which was void as against the plaintiffs being in contravention of the provisions of section 85 of the Bengal Tenancy Act, were still entitled to a notice to quit before they could be ejected by the plaintiffs. Where an under-raiyati interest was created without a registered lease and without the consent of the landlord, the under-raiyat is entitled to a notice under section 49 before he can be ejected by the superior landlord who purchases the raiyat's holding: see *Amirullah v. Nazir Mahomed* (1) and (2). The reason for the rule being that the landlord cannot claim any higher right in respect of the under-lease than his vendor possessed. The same principle ought to hold good in the case where the landlord acquires the holdings of the raiyat by virtue of surrender or

(1) (1904) I. L. R. 31 Calc. 932.

(2) (1905) I. L. R. 34 Calc. 104.

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abandonment. By surrender or abandonment the raiyat could not confer a higher right on the landlord than what he himself had. By surrender or abandonment the holding may disappear for all purposes except for the purpose of keeping alive the interest of under-raiyats : *Lal Mahomed v. Jagir Sheikh* (1). A lessee, holding under a lease that is void because contravening the provisions of section 85 of the Bengal Tenancy Act, cannot be regarded as a trespasser and is not liable to be ejected without a notice to quit under clause (b) of section 49 : *Fazel Sheikh v. Keramuddi Sheikh* (2). Section 22 also provides that, when an occupancy holding is acquired by the landlord, the *raiya* interest merges in that of the landlord, but this cannot prejudicially affect the rights of any third person. The words "or otherwise" in section 22 include the case of surrender and abandonment.

Babu Sarat Chandra Ray Chowdhury and *Babu Satya Charan Sinha*, for the respondents, were not called upon.

SANDERSON C. J. In this case I think that the appeal should be dismissed in spite of the argument which Dr. Dwarkanath Mitter has addressed to us. The plaintiffs obtained a settlement of the land from the admitted landlord in April 1911. Defendants Nos. 1 and 2 who are appealing to this Court obtained their title to the interest, which they now have under defendant No. 4. Defendant No. 4 was a person who had the original right of occupancy, and he sub-let it to defendants Nos. 1 and 2; no objections can be taken to the proceeding of defendant No. 4 in sub-letting which created an interest in defendants Nos. 1 and 2—the interest of an under-raiyat. The defendant No. 4 then sold his right as occupancy

(1) (1909) 13 C. W. N. 913.

(2) (1902) 6 C. W. N. 916.

raiyat to defendants Nos. 1 and 2. It turns out that the occupancy right was that of a non-transferable occupancy holding which the defendant No. 4 had no power to assign to defendants Nos. 1 and 2, and Dr. Dwarkanath Mitter does not claim on behalf of defendants Nos. 1 and 2 as transferees under that sale, but he claims on behalf of them under the sub-letting, whereby he says they became under-raiyats; and that, inasmuch as they became under-raiyats, they were entitled to notice under section 49 of the Bengal Tenancy Act, and that such notice not having been given the present suit would not lie as it is a suit which comes within section 49, being a suit by the landlord claiming to eject an under-raiyat. I do not think that that argument can be maintained for two reasons: first of all, I do not think that after the sale by defendant No. 4 of his interest to defendants Nos. 1 and 2, they were in the position of under-raiyats, because defendant No. 4 having transferred or having purported to transfer his interest to defendants Nos. 1 and 2, left the land and disappeared altogether. The result of that transaction was equivalent to abandonment by defendant No. 4 of the whole of his interest. Then the position was that there was the landlord and defendant Nos. 1 and 2, and there was no body between them: as it was put during the course of the argument the landlord and the defendants Nos. 1 and 2 were face to face. Those are the facts of the case. In spite of Dr. Dwarka Nath Mitter's ingenious argument, I cannot understand how after that transaction had taken place defendants 1 and 2 any longer occupied the position of under-raiyats: and I think that is sufficient reason to justify the dismissal of the appeal.

But I think there is also another reason, viz., that according to the decision in the case of *Badan*

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Chandra Das v. Rajeswari Debya (1) where Mr. Justice Ghose, who delivered the judgment of the Court, said at page 572, "Section 49 of the Bengal Tenancy Act which has been referred to has no application to this case. That section refers to a suit in ejectment brought by the immediate landlord of the under-raiyat." Now, if Dr. Dwarkanath Mitter's argument upon the other point is to be given effect to, namely, that the intermediate tenure must be taken as being abandoned for all other purposes except for the protection of the *under-raiyati* then this action is not brought by the raiyat who was the immediate landlord of the under-raiyat and that is an additional reason why the notice specified by section 49 need not be given.

For these two reasons, I think that the judgments, which according to the learned vakil for the appellants have been consistently against them, are right judgments, and this appeal should be dismissed with costs.

MOOKERJEE J. I agree that the decree made by Mr. Justice Fletcher, in affirmance of the concurrent decisions of the Courts below, cannot be successfully assailed. To bring into relief the ingenious argument addressed to us by Dr. Dwarkanath Mitra, I shall state the facts of the case stripped of superfluous details. X was the tenure-holder in respect of the disputed land. Y held under him a non-transferable *raiyati* holding. Z was the under-raiyat under Y. Y then transferred his interest to Z and disappeared from the land; this transfer was clearly inoperative against X. X subsequently granted an under-tenure to A, who now sues to eject Z. The contention of Z is that he is entitled to the notice prescribed by section 44, clause

(b) of the Bengal Tenancy Act. This defence has been overruled by all the Courts.

Clause (b) of section 49 provides that "an under-raiyat shall not be liable to be ejected by his landlord, except, when holding otherwise than under a written lease, at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord." To entitle Z to claim the protection of section 49, he has to establish that this is a suit for ejectment by his landlord. Now section 4, clause (c), which specifies the different classes of tenants under the Bengal Tenancy Act, shows that an under-raiyat is a tenant holding, whether immediately or mediately, under a raiyat. Consequently, the landlord of an under-raiyat is a raiyat, in other words, Z must establish that he holds under a raiyat. This he cannot do, for in the events which have happened, he holds now under a tenure-holder. It is thus plain that he is not entitled to the benefit of section 49. This view is in accord with that taken in the cases of *Nilkanta Chaki v. Ghatoo Sheikh*(1) and *Badan v. Rajeswari* (2).

But it has been contended on behalf of the appellant that he is not a trespasser and his tenancy must be terminated by a notice to quit before he can be sued in ejectment. In support of this position, reference has been made to an observation of Jenkins C. J. in the case of *Lal Mahomed Sarkar v. Jagir Sheikh*(3), where it was said, in circumstances entirely different from those of the case before us, that a holding may cease to exist except for one purpose, namely, for the benefit of the under-raiyat. Reference has also been made to the decisions in *Amirullah Mahomed v. Nazir Mahomed* (4) and *Amirullah Mahomed v. Nazir*

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Mahomed (1). The appellant has further invoked the assistance of the principle deducible from *Raghunath Singh v. William Cox* (2), that a person cannot, by surrender, do what he could not achieve by assignment. These cases, however, are all clearly distinguishable. Here we have neither an assignment nor a surrender, but a sale accompanied by abandonment. Y transferred his raiyati holding to Z, although he was not competent to do so. He then disappeared from the land and made no provision for the payment of rent to X. The consequence in law was that the holding was abandoned, and the tenancy ceased to exist. X was thereupon brought into direct contact with Z. The sale by Y, to which X was not a party, did not in any way affect his rights as tenure-holder; what were those rights then? Clause (1) of section 85 of the Bengal Tenancy Act provides "that if a raiyat sub-lets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord, unless made with the landlord's consent." Here the oral sub-lease by Y in favour of Z was not made with the consent of X and consequently was not valid against X. This conclusion completely negatives the contention that although the sub-lease by Y in favour of Z, which is the root of the title of Z, is not valid as against X, yet X is bound to treat Z as an under-raiyat and is under an obligation to give him the requisite notice under section 49. From whatever point of view the case is examined, it is thus plain that X, or A who has derived title from him, is entitled to eject Z without prior notice under section 49.

G. S.

Appeal dismissed.

(1) (1905) I. L. R. 34 Cal. 104. (2) (1914) 19 C. W. N. 268.

CRIMINAL REFERENCE.

Before Chaudhuri and Newbould JJ.

MOHAMMED HOSAIN

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Sep. 22.

Railway Passenger—Fraud—Travelling without a ticket but not with intent to defraud—Course open to Railway Administration in such case—Power to forcibly eject passenger—Assault—“Railway”—“Rolling stock”—Railways Act (IX of 1890) ss. 3 (4), (10), 68, 69, 113, 120, 122—Railways Act (IV of 1879), ss. 31 and 32—Enhancement of sentence on hearing of Reference.

The main and primary purpose of ss. 68 and 69 of the Railways Act (IX of 1890) is to prevent persons from travelling in fraud of the Company without payment of the fare, and the obligation to show their tickets when required, is subsidiary only to such purpose.

Travelling without a ticket, in the absence of intent to defraud, is not an offence. In such a case the only course open to the Railway Administration is that provided in s. 113.

There is no provision in the Act for ejecting passengers except in certain circumstances such as are specified in s. 120. S. 122 does not apply to passengers travelling in a railway carriage, as the term “railway” in s. 3 (4) excludes a carriage.

Where a person travelled without a ticket, not with intent to defraud but because he arrived as the train was about to start and was, therefore, unable to purchase one, and when asked for it by the travelling ticket-checkers offered to pay the fare and excess charge on grant of a receipt, but refused to leave the compartment at the next station and purchase a ticket as he was directed to do by the ticket-checkers :—

Held, that the ticket-checkers had no lawful authority to remove him thereupon forcibly from the carriage and to beat him with their fists, and that they were guilty of an offence under s. 323 of the Penal Code.

Pratab Daji v. B. B. & C. I. Railway Co. (1) distinguished.

* Criminal Reference, No. 157 of 1916, by S. P. Baksi, Sessions Judge of Noakhali, dated Sep. 5, 1916, against the order of P. Sen, Sub-divisional Magistrate of Noakhali, dated June 26, 1916.

(1) (1875) I. L. R. 1 Bom. 52.

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The Court cannot entertain an application for enhancement on the hearing of a reference under s. 438 of the Code. Such applications ought to be made in the usual way, and are not ordinarily entertained on behalf of private parties.

ON the 27th February 1916, the complainant arrived at the Feni railway station, on the Assam Bengal Railway, as the train was about to start, and being unable to purchase a ticket got into a carriage without it. On the journey the accused, A. W. Farley and B. Ross, travelling ticket-checkers of the Railway Company, entered the compartment and asked the complainant for his ticket. The latter explained that he had no time to obtain one, and offered to pay the fare and excess charge. The accused declined to accept the offer, and when the train arrived at the next station (Sarisadi) directed him to get out and purchase a ticket. The complainant refused to do so, whereupon he was forcibly taken out of the compartment, beaten with fists by the accused and made over to the station master. The accused were tried under ss. 323 and 342 of the Penal Code by the Sub-divisional Officer of Noakhali who by his judgment, dated the 26th June 1916, convicted them under s. 323 only and sentenced them to a fine of Rs. 25 each. The material portion of the Magistrate's judgment dealing with the questions of law raised, is as follows :—

A passenger who travels without a ticket commits no *offence* under the Railways Act, but under s. 113 of the Act the excess charge and fare is to be paid by him, and if he refuses to do so the Magistrate recovers the fine for the Railway (*vide* s. 113, cl. (2) of the Railways Act). There is no provision in the Act for ejecting a passenger or using force towards him, and the only thing that a Railway Administration can do is to proceed under section 113, cl. (1). In the present case it is not contended that the

proper name and address was not given ; consequently, the other provisions of s. 113 of the Railways Act do not apply.

As regards the ruling quoted, I do not think this would apply. In this case (I. L. R. 1 Bom. 52) the complainant did not buy a ticket and tried to buy a ticket afterwards, and he was detained, and it was held that there was no *legal obligation* on the station master to issue a ticket (I. L. R. 1 Bom. 52), but the present case is different. The complainant travelled in the train without a ticket. The only thing that can be done is to levy the fare and penalty, and the complainant cannot be taken out by force and kicked on his refusal to go out, or given blows. I have already stated that travelling without a ticket is not a criminal offence [vide *Hart v. Buskin* (1)] and it has been held that even if a passenger refuses to pay, the amount can be recovered as a fare and not as a fine. In the present case the complainant *offered to pay*, and he was taken out by force and beaten. I think that there was absolutely no justification for it.

The accused, thereupon, moved the Sessions Judge of Noakhali who referred the case to the High Court, under s. 438 of the Criminal Procedure Code. The material portions of the letter of reference are as follows :—

The other grounds urged are that the Deputy Magistrate should have held that the complainant was a trespasser, that the petitioners were not bound and had no authority to take the fare and penalty, that in case of his refusal to go out of the carriage they had the right of ejecting him from it and in doing so to use such force as was necessary for the purpose and that they were within their rights in dealing with the complainant in the way they did. The learned Deputy Magistrate has first found that the petitioners voluntarily caused hurt to the complainant and committed an offence under section 323, I. P. C. He has then found that complainant was no trespasser and the petitioners had no right to eject him.

On a consideration of the law and the general principles on the subject, I have come to the conclusion that the complainant was a trespasser under the Indian Railways Act (IX of 1890) and also in the ordinary sense of the word, though not a trespasser within the scope of the Indian Penal Code. Section 68 of that Act provides that no person shall, without the permission of a railway servant, enter any carriage on a railway for the purpose of travelling therein unless he has with him a proper pass or ticket. So if a person contravenes this provision his entry into the carriage is unlawful, and in this sense he must be said to be a trespasser

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within the meaning of this Act. Section 122 of the Act provides that, if a person unlawfully enters upon a railway, he may be removed by the servants of the Railway Company in case of his refusal to leave the railway on being requested by them to do so. If I am right in my view that the complainant entered the carriage unlawfully, it follows that the petitioners had the right of ejecting him in case of his refusal. . . . I should note in this connection that the complainant's case was that he took the guard's permission. The guard has denied it. Rule 80 of the Company's Coaching Tariff shews that under such circumstances the guard should give a certificate in writing. No such certificate was given. The learned Deputy Magistrate should have recorded a finding on this point, but he has not done so. I say that complainant was a trespasser taking it that he did not obtain the guard's permission. Again, apart from those sections, it cannot be denied that the railway line and the carriages belong to the Company, and they have the general rights or the common law rights of ownership over them. That being so, they can exclude or remove any one from them if he enters into or upon them without their consent and without obeying the rules and laws. Therefore, we must see if this power, which is a necessary incident of ownership, has been curtailed or taken away by the Indian Railways Act or any other enactment in force. The learned Deputy Magistrate seems to have found that section 113 of the Indian Railways Act has deprived them of this power. I am unable to agree with him. This is an enabling section empowering the railway owners to have their fare and compensation and providing a machinery for the realization of the same, but it does not, I think, deprive them of their general right of preventing an intruder or trespasser from further travelling without a ticket and of removing him in case of his refusal to go out. The learned Deputy Magistrate has observed that travelling without a ticket has not been made an offence by the Indian Railways Act. I have already said that it is an offence within section 122 of that Act, but supposing that it is not I do not think it is any reason why the railway owners will not have the ordinary rights of ownership referred to above. The case of *Pratab Daji v. B. B. & C. I. Ry. Company* (1) seems to have been decided on these principles. So in my opinion the learned Deputy Magistrate ought to have found that the complainant was an intruder or trespasser, and that the petitioners had the right of ejecting him from the carriage, and then to have decided the question whether or not the force or hurt found to have been caused to the complainant was necessary for the purpose of ejecting him. In this view, I would submit that there has not been a proper trial of the case, and would, therefore, make this

reference and recommend that the conviction and sentences be quashed and a re-trial ordered on the lines indicated herein.

Babu Bhagirath Chandra Das, for the complainant.

Babu Manmatha Nath Mukerjee and *Babu Prabhat Chandra Dutt*, for the accused.

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CHAUDHURI AND NEWBOULD JJ. We think the Magistrate was right in convicting the accused under section 323 of the Indian Penal Code.

There is no provision in the Railways Act for ejecting passengers except in certain circumstances, such as are specified in section 120. Section 122 of the Railways Act of 1890 is not applicable to this case. The term "railway" as defined in section 3, clause (4) excludes a railway carriage. The term "rolling stock" as defined in section 3, clause (10) includes it. There is no provision corresponding to Section 3 sub-clause (10) in the old Acts of 1854 and 1879. Section 68 prohibits travelling without a pass or ticket, but so to travel without intent to defraud is not a criminal offence. Here there is a distinct finding that there was no fraudulent intent. Section 113 provides that a person so travelling shall be liable to pay on demand by any railway servant an excess charge. This section corresponds to sections 31 and 32 of Act IV of 1879. It is to be noticed that there was no provision in the Act of 1879 for payment of an excess charge, which is somewhat in the nature of a penalty. Taking that provision in connection with the fact that travelling in a railway carriage without a ticket, but without fraudulent intent, has not been made punishable, we think that the Magistrate has taken an entirely correct view of the law. *Pratab Daji v. B.B. & C.I. Railway Co.* (1) was a civil

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case which arose out of a claim for damages for wrongful detention and removal of a passenger. It was decided under the old Act, which has since been amended and altered. The expression "railway" in section 122 as already stated does not include a railway carriage. In addition to the definitions, a comparison of section 120 and section 122 leads to the same conclusion. Railway servants are public servants. They are to act within the four corners of their statutory powers. It was held in *Butler v. Manchester, Sheffield and Lincolnshire Railway Co.*(1) by Lord Esher M. R., that no one had any right to lay hands forcibly on a passenger in the absence of some legal authority to do so. Lindley L. J. and Lopes L. J. agreed in that view and held that the company's servants were not justified, in the absence of any by-law or regulation, in laying hands on a passenger.

The main and primary purpose of sections 68 and 69 of the Indian Railways Act is to prevent persons from travelling in fraud of the Company without having paid the necessary fare, and that the obligation to show the ticket, when required, is subsidiary only to such primary purpose. Travelling without a ticket is not a criminal offence, as has been repeatedly held in this Court. It is the frequent practice of ticket-checkers to take money and issue tickets to passengers, who may have got into a train in a hurry, without tickets, as appears from the evidence. In this case the complainant was perfectly willing and offered to pay the fare together with any excess that might be chargeable. Under the circumstances, it would be absurd to hold that the ticket-checkers concerned were legally justified in committing the acts charged against them. The least that can be said about the acts complained of is that they were extremely high-

(1) (1888) 21 Q. B. D. 207.

handed. The complaint was that the accused had abused the complainant and got him out by force and kicked him and given him a beating, that he was kept confined the whole night and was released the next day. The learned Magistrate has found the two accused guilty under section 323 of the Indian Penal Code, and gave them his benefit of his doubt as regards the charge under section 342. The learned Magistrate has also found that the injuries on the person of the complainant were caused by voluntary blows and that those blows were given by the accused with their fists. It is clear that the accused used more force than was necessary for the purpose of removal. The learned Sessions Judge says that, although it is not a case of trespass as defined in the Penal Code, it is at least a civil trespass, and that the owners are entitled to use their common law rights. This is due to his having overlooked the position of a railway company and its servants. He has overlooked the fact that they as such, cannot in a case like this, claim common law rights. Where is there again a "common law right" to inflict blows on a man with fists if he refuses to move?

Ticket collectors and checkers are expected to conduct themselves with restraint and self control. We are disposed to think that they have been leniently dealt with in this case, and refuse the reference. The judgment of the Magistrate, we may add, is characterized by great ability and care.*

E. H. M.

Conviction upheld.

* This reference was on the Undefended List. After the above judgment was signed by the learned Judges, but before it was sent down, an application was made by the vakil for the accused to be allowed to be heard, as he could not appear in time and file his *vakalatnama*, having been misled, as he stated, by the printed list. The learned Judges

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thereupon directed the matter to be placed on the list, and heard him. The learned Judges stated that although they doubted their power to review a judgment already signed, they had given the accused an opportunity to be heard, as they felt that if any ground was shown for reconsideration of their decision, they might have made a recommendation to the Government stating their views, but they found no reason for altering their views and they affirmed their judgment.

An application was then made by the vakil for the complainant for enhancement of the sentence. The learned Judges held that they could not entertain such an application on the reference, especially as it was not ordinarily entertained on behalf of a private party.

INSOLVENCY JURISDICTION.

Before Greaves J.

KEISSORY MOHAN ROY, *In re*.*

Insolvency—Practice—Presidency Towns Insolvency Act (III of 1909), s. 36, whether applications under, may be made ex parte—S. 112, rules framed thereunder—Rules 17, 18, 19 and 30.

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June 27.

According to the rules framed by the Calcutta High Court under s. 112 of the Presidency Towns Insolvency Act, applications under s. 36 may be, and are intended to be, made *ex parte*.

APPLICATION.

This was an application on behalf of one Lachmi Chand Karnavat to set aside an order made on April 26, 1916, by the Registrar in Insolvency for his examination under s. 36 (1) of the Presidency Towns Insolvency Act. The order was obtained *ex parte* on the petition of one Balkissen Bagri, a creditor of the insolvent, and the applicant sought to have the Registrar's order set aside by the Court on the ground that it was made *ex parte*.

Mr. Langford James (with him *Mr. B. K. Ghosh*),

* Insolvency Jurisdiction ; No. 194 of 1911.

for the applicant, Lachmi Chand Karnavat. The Registrar ought not to have made an order against my client *ex parte*. Under rules 17 and 18 of the Calcutta Insolvency Rules all applications in insolvency should be made by motion or notice, unless the Court is satisfied that the delay caused by proceeding in the ordinary way would or might entail serious mischief. There was nothing in the petition of Balkissen Bagri to show that such delay would have caused any mischief.

Mr. Sarat C. Bose (for *Mr. N. N. Sircar*), for Balkissen Bagri. Rules 17 and 18 do not apply. Rule 30 is the rule that lays down the procedure governing applications under s. 36. That rule does not require that such applications should be made on notice. I submit applications under s. 36 can be made *ex parte*.

GREAVES J. This is an application made on behalf of one Lachmi Chand Karnavat to set aside an order made on the 26th April, 1916, by the Registrar for his examination under section 36 of the Presidency Towns Insolvency Act. The order was obtained *ex parte* at the instance of one Balkissen Bagri, a creditor of the insolvent. It was made on the petition of Balkissen Bagri filed on the 15th April, 1916, and the petition alleges that Balkissen Bagri filed an affidavit in proof of his claim, and I understand from the petition that the Official Assignee admitted the proof by a letter dated the 31st July 1915 addressed to Balkissen's attorney. The ground upon which the applicant seeks to set aside the order is, that it was made *ex parte*.

Section 36 (1) of the Presidency Towns Insolvency Act provides that the Court may, on the application of the Official Assignee or of any creditor who has proved his debt at any time after an order of adjudication

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has been made, summon before it, in such manner as may be prescribed, the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent or any person whom the Court may decree capable of giving information respecting the insolvent, his dealings or property, and that the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property.

Rule 17 of the rules made under the Act provides that every application to the Court (unless otherwise provided by these rules, or the Court shall in any particular case otherwise direct) shall be made by motion supported by affidavit.

Rule 18 provides that where any party other than the applicant is affected by the motion no order shall be made, unless upon the consent of such party duly shown to the Court or upon proof that notice of the intended motion and a copy of the affidavit in support thereof have been duly served upon such party, but the rule contains a proviso that the Court may make an *ex parte* order if delay would entail serious mischief.

If these rules govern applications under section 36 of the Act, then the *ex parte* order was clearly wrong, unless the Registrar thought that any delay would entail serious mischief.

But I was referred to another rule by counsel who opposed the application, that is to say, to rule 30 which is as follows: "Every application to the Court under section 36 of the Act shall be in writing, and shall state shortly the grounds upon which the application is made." This rule to my mind clearly contemplates a procedure other than that laid down under rules 18 and 19, and it contains no provision for

service of the application upon the person sought to be examined such as is contained in rule 19. Under these circumstances, the inference to my mind is irresistible that applications under section 36 are intended to be made *ex parte*, and that this is the manner prescribed by the rules framed under section 112 of the Act.

I am fortified in this view by a reference to the English Bankruptcy Act of 1914, (4 & 5 Geo. 5, c. 59). The section of that Act, which corresponds to section 36 is section 25; the wording is almost identical, except that the section of the English Act does not contain the words "in such manner as may be prescribed." Rules 26 and 27 of the English Act are identical with rules 17 and 18 of the Presidency Towns Insolvency Act, and rule 74 of the English Act is identical with rule 30 of that Act.

Form 144 of the forms under the English Act is a form of summons under section 25 of that Act (*see* William's Bankruptcy Practice, 11th edition, p. 645) to attend for examination, and a perusal of that form, to my mind, indicates that this is the first notification to the person to be examined, and that he has had no previous notice of motion served upon him at the time of the application for leave to examine him, and that is to say that the order for his examination was made *ex parte*. The application is dismissed with costs.

A. K. R.

Application dismissed.

Attorney for the applicant: *J. N. Mitter.*

Attorney for the creditor: *S. C. Mitter.*

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SPECIAL BENCH.

Before Sanderson C.J., Mookerjee, Chitty, Teunon and Chaudhuri JJ.

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Pleader—Admission of women as pleaders—Disqualification—Constant Tradition—Regulation of 1781 for the Administration of Justice—Regulation VII of 1793 (Vakils), Preamble—Regulation XXVII of 1814 (Vakils), Preamble, ss. 4, 5, 10 to 14, 18, 20 to 22, 30, 35, 37—Legal Practitioners Act (I of 1846) ss. 4, 12—Pleasers of Lower Provinces Act (XVIII of 1852)—Legal Practitioners Act (XX of 1853)—Calcutta University Act (II of 1857)—Penal Code (XLV of 1860), s. 8—Succession Act (X of 1865), s. 3—Mofussil Small Cause Courts Act (XI of 1865), s. 1—Pleaders, Mukhtears and Revenue Agents Act (XX of 1865), ss. 2, 5, Sch. II—The Punjab Chief Courts Act (XXIII of 1865), s. 1—Pleaders Amending Act (XXIX of 1865)—General Clauses Act (I of 1868), s. 2 (1)—Legal Practitioners Act (XVIII of 1879), s. 6, High Court Rules thereunder—General Clauses Act (X of 1897), s. 13.

As the law now stands, women are not entitled to be enrolled as pleaders of Courts subordinate to the High Court.

The Rules of the High Court were made in accordance with and for the purpose of carrying out the intention of the Legal Practitioners Act, 1879, and are not *ultra vires*.

Per MOOKERJEE J. It is improper to give an extended construction of a statute, in the absence of an intention on the part of the Legislature, to reverse the established policy or to introduce a fundamental change in long established principles of law. Where it appears that a change of such a policy is desirable, the proper remedy is legislation and not an alteration of the law in the disguise of judicial exposition of the existing law.

Case law on the subject referred to.

Per CHITTY J. In framing rules under an Act of the Legislature the Court should not use any particular expression or word in a different sense to that applied to the particular expression or word by the Act itself. But it is doubtful whether the General Clauses Act applies to rules framed by the High Court under the Legal Practitioners Act, 1879.

* Special Bench on an application under Rule 18 of the High Court Rules.

APPLICATION by Miss Regina Guha for enrolment as pleader in the Court of the District Judge of Alipur.

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The facts of the case will appear from the petition which is set out *in extenso* in the judgment of the Chief Justice.

Mr. Eardley Norton (with him *Mr. P. K. Majumdar*, *Mr. M. N. Kanjilal* and *Babu Manmatha Nath Mookerji*), for the petitioner. There is no doubt that the petitioner has got the necessary qualifications for admission as a pleader. She applied to the District Judge under Rule 27 of the Rules framed by this Court under the Legal Practitioners Act. By that Rule, any *person* who has passed the B. L. Examination may be admitted as pleader. There is nothing in the Rules to show restriction against females. See the General Clauses Act, 1897, ss. 3 (39), 13 (1). These words importing the masculine gender include females. The Indian Penal Code also makes no distinction of sex. "Any *person*" in that Rule includes males as well as females. This is not repugnant to the context of the Act. Even if the Rules as a whole indicate that only males are meant, I would contend that the Rules cannot abrogate the right of any one, if he or she falls within the rights allowed by the Statute.

[CHITTY J. The General Clauses Act of 1897 only applies to Acts which were passed afterwards.]

There is the earlier Act of 1868 which also makes no distinction between the sexes.

[SANDERSON C. J. The question is who is a *proper* person to be admitted a pleader as required by the Statute.]

See Legal Practitioners Act, ss. 3, 6 to 10.

[SANDERSON C. J. I suppose pleaders did not come into existence in consequence of that Act. They

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existed long before that. Who were entitled to be enrolled as pleaders before the Act of 1879 ?]

Act XX of 1865.

[SANDERSON C. J. Pleadors came into existence before that even, I believe ?]

Very likely we have to look up the Regulations.

[SANDERSON C. J. I think the statute of 1879 only allowed existing state of things to continue: see s. 5. Is there any similar section as to vakils ?]

I do not think there is in this Act.

[CHAUDHURI J. The control is with this Court. Sections 4 and 5 speak of existing rights.]

There is nothing in the Act of 1879 which is repugnant to my contention. You should not make stringent rules. I deny your right to make rules favouring one sex. If you do, it will be *ultra vires*.

[SANDERSON C. J. The Rules as they stand now contemplate the admission of men only.]

That is the point in issue. I contend you have no right to put the limit.

As regards "proper person," it has reference to moral character and social status. The expression has no reference to sex at all. Rule 21 of the General Rules of the High Court makes the point quite clear. Practice cannot interfere with the meaning of words. Speaking of practice, it has been held at home that long usage is conclusive evidence that "person" includes only men: *Bebb v. Law Society* (1).

So far as Bengal is concerned, this application of Miss Regina Guha is *res integra*.

The conditions of women in England and India are quite different. Here, under the circumstances now prevailing, the privilege should be extended to women. Women practitioners are needed to give legal advice to *purdanashin* women. As regards the case cited

above, it was decided on principles of common law. But common law does not apply here outside the presidency town: *Legal Remembrancer v. Matilal Ghose* (1).

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The jealousy of men is at the root of the mischief. Gradually other professions are being opened up, *e.g.*, Medicine. Force of circumstances must not be overlooked. The argument in *Bebb's Case* (2) overlooked this important factor.

[SANDERSON C. J. It is no question of policy. It is a question of construction of statutes. What was the state of things when the Act of 1879 was passed?]

That is so. My contention is abstention of claim cannot cause complete confiscation of right. You should also remember that in India there is no such long usage as in England. You are moreover sitting in the appellate side. You can exercise common law powers only in the Original Side.

Times are changed. An instance is the introduction of Married Women's Property Act to remove the fetters of women. Look again at the case of rights of husbands in ancient times to take by force the physical possession of wife.

[SANDERSON C. J. Look at Regulations VII of 1793, where only men were recognized. We only take notice of existing state of things.]

That is only descriptive of *de facto* situation of affairs. It did not necessarily lay down the intention of the Legislature for all times to come. The Preamble is confined to Hindus and Mahomedans only. Now there is no restriction as regards religion.

[SANDERSON C. J. No. It speaks of men versed in Hindu and Mahomedan laws.]

Any way, they were not legislating *in futuro*. Look at section 5: only the Colleges in Calcutta and

(1) (1913) I. L. R. 41 Calc. 173.

(2) [1914] 1 Ch. 286.

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Benares were mentioned. Is not that changed? Look at the last portion of the section.

[MOOKERJEE J. That portion is a reproduction of an older provision.]

You will find in the Regulation of 1814, the word "men" has disappeared. We have instead of it "person." It is a significant alteration.

Legislation in India, unlike England, is progressive. You should not, therefore, follow the English precedent. There has been a stagnation in English statutes.

The Regulation of 1814 was repealed by Act I of 1846.

The liberal tendency of the Legislature here is shown in the appointment of Miss Sorabji as legal adviser of the Court of Wards.

The Advocate-General (Sir S. P. Sinha) representing the Bar. After all that has been said by Mr. Norton, I wish only to refer to Harington's Analysis Vol. I, p. 147. It points out that Regulation VII of 1793 laid down the foundation of the profession in this country. Then it speaks of the Regulation of 1814. At the time when the profession was constituted, only men were authorized to be admitted as pleaders. One cannot conceive of anything else. Undoubtedly legislation has been progressive. But the profession was always confined to men. Successive legislation only removed restrictions as regards men. No doubt later statutes speak of "persons". It is for your Lordships to say what the change meant. True, the General Clauses Acts of 1868 and 1897 make no difference of the sexes. But the difficulty of my friend is not with regard to the word "person," but with regard to the personal pronouns "he", "she", "his" and "her". The word "person" would include both sexes without the General Clauses Acts. The

question is whether having regard to the history of the profession, it can be said that "he" includes "she".

[SANDERSON C. J. Has the General Clauses Act retrospective effect?]

I do not think so.

You may remember the old provision that pleaders being officers of Court must attend every day whether they had cases or not. Such a state of things would be hardly consistent with the idea of women practitioners. That was altered in 1856.

So far as "qualifications" are concerned, the word referred to education, respectability and character. They have no reference to sex. If the Act authorises both men and women to be pleaders, you cannot restrict women by your Rules. I do not think the Rules laid down by you are to be governed by the General Clauses Act. My friend is entitled to show that the Rules are *ultra vires*. But that is not the point. The Rules do seem to refer to men only.

Precedents are not of much assistance to us. The Rules as to admission to Inns of Court are not applicable. If there is a Common Law of India, it certainly did not intend ladies to be pleaders. From an article in the Calcutta Law Journal, it appears legal practitioners used to appear before Hindu and Mahomedan Kings, but there is no mention anywhere of women practitioners.

As regards ancient history, one does not like to launch on discussion without thorough investigation.

The Common Law of England is to some extent applicable in Calcutta. If women are not allowed to practice in Calcutta, but are allowed outside, it would bring about inconsistency and anomaly. It is not a matter that is free from difficulty.

The Senior Government Pleader (Babu Ramcharan Mitra), for the vakils, had nothing to add.

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SANDERSON C. J. This matter comes before this Court upon a petition of Miss Regina Guha.

The circumstances are set out therein as follows :—

1. "That your petitioner obtained the degree of the Bachelor of Law of the University of Calcutta in the year 1916.

2. "That your petitioner desiring to be admitted to practise as a pleader in the District of 24-Perganas, paid into the Government Treasury of the said district the fee prescribed by Rule 27 of the Rules framed by the Hon'ble High Court under the Legal Practitioners Act and also presented her diploma, the receipt for the said fee and a stamp paper of necessary value of her first certificate to practise, to the learned District Judge of 24-Perganas together with the necessary application for admission.

3. "That the learned District Judge of 24-Perganas by a memorandum, dated the 3rd April, 1916, forwarded the said application to the Hon'ble High Court for orders as to your petitioner's enrolment.

4. "That about the 16th of June, 1916, your petitioner received a memorandum from the learned District Judge, being memorandum No. 912, dated 15th June, 1916, forwarding for her information a copy of the communication addressed to him by the Registrar of the Appellate Side of the said Hon'ble Court. The said memorandum is annexed hereunto and marked with the letter A.

5. "That your petitioner accordingly begs humbly to move your Lordships and prays that in view of the fact that she is a person duly qualified under the Rules to be entitled to enrolment as a pleader, your Lordships may be graciously pleased to order her to be enrolled as such or pass such other necessary orders as to your Lordships may seem fit and proper."

In consequence of the petition, this Court was formed for the purpose of hearing this application argued and deciding in a judicial capacity what the law relating to the application is. As it is a matter of considerable importance, both to the public and the legal profession, I directed that notice should be given to the Advocate-General and the Senior Government Pleader so that we might have the benefit of their assistance. It should be clearly understood that it is not the function of the Court to express any opinion as to whether it is desirable that women should be

admitted as pleaders in the Courts subordinate to the High Courts and that this Court was formed merely for the purpose of deciding the question in a judicial capacity.

The question depends upon the true construction of the Legal Practitioners Act (XVIII of 1879), section 6, and the Rules made by the High Court in pursuance thereof.

It was argued by learned counsel for the applicant (i) that the words used in the said section are large enough to include both sexes and consequently that women are not excluded.

(ii) That the Rules do not exclude women.

(iii) That if the Rules do exclude women, the Rules are *ultra vires*.

Chapter XI, Part I of the General Rules of the High Court contains the Rules as to the qualification, admission and certificates, etc., of pleaders and mukhtears in Courts subordinate to the High Court, framed under clauses (a), (b), (c) and (d) of section 6 of Act XVIII of 1879 and Rules 3 to 6 inclusive are the rules directly in point in this matter. The applicant has obtained the degree of Bachelor of Law at the University of Calcutta, one of the qualifications specified in Rule 3 and has made her application within a year as provided by the said Rule.

The first question is, what is the proper construction to be placed on section 6 of the Legal Practitioners Act, 1879? The language used in section 7 and following sections, such as the words "him" and "his" point to an intention of the Legislature that it was a male person only who could be admitted a pleader of the subordinate Courts, but by the General Clauses Act of 1868 (I of 1868), section 2, it was provided that in all Acts made by the Governor-General of India in Council after that Act should have come into operation, unless

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there was something repugnant in the subject or context, words importing the masculine gender should be taken to include females, so that the use of the language above referred to in the Act of 1879 is not conclusive.

It is necessary, therefore, to consider what was the subject with which the Legislature was dealing and what was the position of affairs relating to the profession of pleaders at the time the Legal Practitioners Act of 1879 was passed. It is clear that the Legislature was dealing with a profession which was well known and which had been established for a long time.

A summary of the Regulations setting forth the origin of the profession of the pleaders in Bengal and the reason for their appointment is to be found in Harington's Analysis, Vol. I. p. 147.

The first Regulation dealing with this matter was Regulation VII of 1793, the preamble to which, after referring to the unsatisfactory state of affairs with regard to the practice in the Courts, provided that "it is therefore indispensably necessary for enabling the Courts duly to administer and the suitors to obtain justice that the pleading of causes should be made a distinct profession and that no persons should be admitted to plead in the Courts, but men of character and education versed in the Mahomedan or Hindu Law and in the Regulations passed by the British Government, and that they should be subjected to rules and restrictions calculated to secure to their clients a diligent and faithful discharge of their trust." This was the origin of the "profession" of pleaders as recognised by the law and it is to be noted that the pleaders were to be chosen from "men" of character and education and that they were to be Mahomedans or Hindus.

The Regulation by its various clauses provided for the appointment and selection of pleaders :—

Clause II : “The Sudder Dewany Adawlat is empowered to appoint from time to time, such a number of pleaders of the Mahomedan or Hindu persuasion, as may appear to them necessary to plead the causes of the parties in suits in the Sudder Dewany Adawlat, the provincial Courts of Appeal and the Courts of Dewany Adawlat in the several zillahs, and the cities of Patna, Dacca, and Murshidabad.”

Clause V : “The pleaders are to be selected from amongst the students in the Mahomedan College at Calcutta, and the Hindu College at Benares, who may be qualified, and be desirous of being admitted to plead in any of the Courts. If the colleges shall not furnish a sufficient number of pleaders, the Sudder Dewany Adawlat is to admit any other persons, provided they be Mahomedans or Hindus, previously however ascertaining that they are men of good character and liberal education, and giving a preference in all cases to persons of this description who have been bred to the study of the Hindu or Mahomedan Law.

Various regulations were subsequently passed. To these, I need not refer. In 1814, however, Regulation XXVII was made for the purpose of reducing into one Regulation with amendments and modifications the several rules which had been passed regarding the office of vakil or native pleaders in the Courts of Civil Judicature.

“Whereas it has been deemed expedient to transfer to the Provincial Courts the control now exercised by the Sudder Dewany Adawlat in the appointment and removal of vakils or native pleaders in the Zillah and City Courts and in the Provincial Courts, and whereas the speedy adjustment of disputes may be facilitated by empowering the authorised vakils to

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receive certain fees for legal opinions furnished by them and by vesting them with authority to act as arbitrators under the General Regulations, and where-as it will contribute to the public convenience to reduce into one Regulation, with amendments and modifications, the whole of the provisions which will be applicable to the office of vakil or native pleader, the following rules have been passed by the Governor-General in Council to be in force from the 1st of February, 1815, throughout the whole of the provinces immediately subject to the Presidency of Fort William."

Cl. III (1): "The Sudder Dewany Adawlat and the several Provincial Courts are empowered to appoint to the office of vakil in their respective Courts, such a number of persons being natives of India and duly qualified for the situation as may from time to time appear to them necessary,"

Cl. III (3): "In the nomination and appointment of persons to the office of vakil the Judges of the Sudder Dewany Adawlat, of the several Provincial Courts, and of the Zillah and City Courts, are restricted to individuals of the Hindu and Mahomedan persuasion and are required to give preference to candidates who may have been educated in any of the Mahomedan or Hindu Colleges established or supported by Government provided that such candidates are in other respects duly qualified for the situation."

By Act 1 of 1846 it was enacted that clause III, section 3 of Regulation XXVII of 1814 should be repealed, and by section 4 it was provided as follows:— Clause IV: "And it is hereby enacted that the office of pleader in the Courts of the East India Company shall be open to all persons of whatever nation or religion, provided that no person shall be admitted a pleader in any of those Courts *unless he shall have obtained a certificate in such manner as shall be*

directed by the Sudder Courts that he is of good character and duly qualified for the office, any Law or Regulation to the contrary notwithstanding."

By this clause the restriction that a pleader must be a Mahomedan or a Hindu was removed and the office of pleader was thrown open to all persons of whatever nation or religion.

It is to be noted that the word "persons" is used in this section, but from the context it is clear that male persons were referred to.

By Act XX of 1865 so much of Regulation XXVII of 1814 as had not already been repealed was thereby repealed and by section 4 it was provided as follows:—

"The High Court is hereby authorised and required within six months after this Act shall take effect in the territories in which such Court exercises jurisdiction, to make rules for the qualification, admission, and enrolment of proper persons to be Pleaders and Mukhtears of the Courts in such territories, for the fees to be paid for the examination, admission and enrolment of such persons and subject to the provisions hereinafter contained for the suspension and dismissal of the pleaders and mukhtears so admitted and enrolled. The High Court may also from time to time vary and add to such rules."

By this section the High Court is the authority to make rules and the persons to be admitted are "proper persons," the same words as those used in the Legal Practitioners Act of 1879.

Section 5 provides as follows:—"Except as hereinafter provided, no person shall appear, plead or act as a Pleader, or appear or act as a Mukhtear in any Court to which this Act extends, unless he shall have been admitted and enrolled and shall be otherwise duly qualified to practise as a Pleader or as a Mukhtear, as

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the case may be, pursuant to the provisions of this Act, and unless he shall continue to be so qualified and enrolled at the time of his practising as a Pleader or Mukhtear as aforesaid: Provided that every person who at the time at which this Act shall come into operation in any part of British India shall be, or shall be qualified to act as, a pleader in any Court in such part by virtue of any law, rule or order in force therein shall be entitled to be admitted and enrolled as a Pleader in the High Court pursuant to the provisions of this Act, without passing any examination, but subject to the conditions of any certificate or diploma held by him as to the class of Courts in which such certificate or diploma authorises him to practise."

It is evident from the language used that the Legislature contemplated the admission of male persons only as pleaders. This is corroborated by the fact that although section 2 provides that words importing the singular shall include the plural, etc., and pleader includes vakils, there is no mention that words importing the masculine gender should include females.

In my judgment it is clear that the intention of the Legislature was to deal with a recognised existing profession, viz., that of pleaders, which up to that time was constituted of men only and to which men only could belong.

In 1868 the first General Clauses Act already referred to, was passed and it was not retrospective.

In 1879 the Legal Practitioners Act was passed. It repealed Act XX of 1865 and it is the Act which is now applicable to this matter.

Reading the sections without reference to the General Clauses Act of 1868, they obviously contemplate the admission of a male person only: and the pre-existing disability of women to be admitted as pleaders was not removed by that Act. The question

remains whether by reason of the application of the aforesaid provisions of the General Clauses Act to the Act of 1879, the Legislature intended to remove the above-mentioned pre-existing disability.

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The subject-matter of the legislation then under consideration was the long-established and well-recognised profession of pleaders, which had consisted for over 80 years of men only, and in respect of which it was admitted that no woman had ever yet applied for admission as a pleader.

It is true that the legislation of the past had been to some extent progressive, but only in the direction of removing restrictions as to the qualifications of men.

The provisions of the 1879 Act upon the matters which are material to this question were practically a re-enactment of Act XX of 1865 and I cannot think that the Legislature in 1879 intended to make such a radical change in the constitution of the profession of pleaders as would be caused by the admission of women merely by the application to the 1879 Act of the provisions of the General Clauses Act of 1868. Further, having regard to the constitution of the profession of pleaders, existing at the date of the passing of the 1879 Act and to the fact that the whole trend of legislation for a long time had been to confine the profession to men, in my judgment, both the subject-matter of the legislation and the context are repugnant to a construction of the Act which would include females.

In my judgment, it could not be intended that such a disability as above mentioned should be removed by a mere interpretation clause. This opinion is confirmed by the decision in *Bebb v. Law Society* (1). There the disability arose from the Common Law of England, and it was held that the disability could not

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be removed, even though the Act, which was under consideration, itself contained an interpretation clause similar to the one in the General Clauses Act, 1868.

In view of the above conclusion, it is not necessary to consider the question as to the applicability of the Common Law of England to this question. I need only mention the reference to it made by the learned Advocate-General, viz., that the Common Law of England obtains in Calcutta and if this is to be taken as a material factor in the construction of the Legal Practitioners Act, 1879, the result might be that there would be a disability upon women in Calcutta and none in the mofussil, a result which could not have been intended by the Legislature.

The Rules of the High Court in my judgment clearly contemplate the admission of men only as pleaders in the Subordinate Courts, and in view of the conclusion I have arrived at as to the construction of the Legal Practitioners Act of 1879, the Rules were made in accordance with, and for the purpose of carrying out, the intention of that Act and are not *ultra vires*.

In my judgment, therefore, the answer to be given to the application must be that as the law now stands Miss Regina Guha is not entitled to be enrolled as a pleader of the subordinate Courts.

We have only to determine what the law is, and if there is to be any change, it is one which must be effected by the Legislature.

MOOKERJEE J. This is an application by Miss Regina Guha for enrolment as a pleader in one of the Courts subordinate to this Court, under the Rules framed in conformity with section 6 of the Legal Practitioners Act, 1879. As this is the first instance of an application by a lady for enrolment as a pleader, her

application has been heard by a Special Bench for judicial determination of the question, whether the Legal Practitioners Act contemplates women practitioners. Three questions, consequently, require consideration, namely, *first*, does the Legal Practitioners Act contemplate women practitioners? *secondly*, if the Legal Practitioners Act contemplates women practitioners, has the High Court by its Rules excluded them? and, *thirdly*, if the Rules exclude them, are the Rules *ultra vires*? The applicant contends that as she has been admitted to the Degree of Bachelor of Law by the University of Calcutta, she is qualified for enrolment under the Rules, although the Rules refer in terms to male persons. She relies upon the well-known principle of construction embodied in section 13 of the General Clauses Act, 1897, that, "in all Acts of the Governor-General in Council and Regulations, unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include females." A provision similar to this, it may be observed, found a place in section 2, clause (1) of the General Clauses Act, 1868: "In this Act and in all Acts made by the Governor-General of India in Council *after this Act shall have come into operation*—unless there be something repugnant in the subject or context—words importing the masculine gender shall be taken to include females." This rule of interpretation is not of direct assistance to the petitioner, unless its operation be extended to the construction of statutory rules. Assume that such extended application is legitimate; still the question remains, whether there is something repugnant in the subject so as to exclude the proposed interpretation. There is thus no escape from the problem, does the Legal Practitioners Act contemplate the existence of women practitioners?

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The preamble to the Legal Practitioners Act, as also the language used in section 6, make it plain, what indeed is well known, that the profession of pleaders was not created by the Legal Practitioners Act. The earliest Regulation on the subject, passed by the Governor-General in Council as a Legislative Body, was made on the 1st May, 1793, and is known as "A Regulation for the appointment of Vakils or Native Pleaders in the Courts of Civil Judicature in the Province of Bengal, Bihar and Orissa" (Regulation VII of 1793). The preamble shows that even before the Regulation was made, there was a profession of vakils in the Courts of Civil Judicature in the British Territories in Bengal, "men, who followed the business of the vakil to obtain a livelihood and appeared in the Courts of Justice or wherever the concerns of their constituents required their attendance." This is made manifest by an examination of the Regulations for the Administration of Justice made by the Governor-General in Council between the 21st August, 1772 and the 23rd November, 1792, and collected by James Edward Colebrooke in his supplement to the Digest of the Regulations and Laws (1807); to take one illustration only, reference may be made to sections 46 and 84 of the Regulation for the administration of justice passed in Council on the 5th July, 1781; these recognise the existence of vakils, and the context shows that *men* alone at that time constituted the profession.

The preamble to Regulation VII of 1793 describes in vivid terms the mode in which these men discharged their duties, their ignorance of the Laws and Regulations, their lack of regularity and diligence, and their disregard of the interests of their clients. The preamble then proceeds to formulate the necessity for the constitution of a distinct profession and the

advantages to the public likely to result from the adoption of such a step: "it is therefore indispensably necessary for enabling the Courts duly to administer, and the suitors to obtain justice, that the pleading of causes should be made a distinct profession; and that no persons should be admitted to plead in the Courts but *men* of character and education versed in the Mahomedan or Hindu Law, and in the Regulations passed by the British Government; and that they should be subjected to rules and restrictions calculated to secure to their clients a diligent and faithful discharge of their trusts." Later on, the preamble states that in order that "*men* of education and respectable character may be solicitous to be admitted as pleaders in the Courts, their appointments ought to be secured to them as long as they conform to the Regulations under which they act." It is beyond controversy, as appears from the language used in the preamble to the Regulation and throughout the various provisions thereof, that the Indian Legislature in 1793 contemplated the admission of *men* alone as what is described in the Regulation as "public pleaders." This was obviously natural; the Legislators themselves had been brought up in a system which knew no women Legal Practitioners, and the circumstances of the country intended to be benefited by their legislation rendered it impossible for them to imagine that women could appear in Courts of Justice as "public pleaders." This Regulation was repealed and replaced by Regulation XXVII of 1814 passed on the 29th November, 1814, "for reducing into one Regulation, with amendments and modifications the several Rules which have been passed regarding the office of vakil or native pleader in the Courts of Civil Judicature." The preamble enumerates the changes which were intended to be

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effected in the pre-existing law on the subject, and it is sufficient for our present purpose to state that there is not the remotest indication of an intention to effect a departure of so fundamental a character as the admission of women into the rank of Legal Practitioners. On the other hand, we find that throughout the Regulation, language is repeatedly used which is appropriate to *men* only as legal practitioners: see, for instance, sections 4, 5, 10, 11, 12, 13, 14, 18, 20, 21, 22, 30, 35 and 37.

This Regulation, however, introduced by section 3, sub-section (3), the restriction that pleaders were to be either of the Hindu or Mahomedan religion and that preference was to be given to candidates who might have been educated in any of the Mahomedan or Hindu Colleges established or supported by Government. This restriction was removed by an Act passed on the 7th January, 1846 (Act I of 1846), the 4th section whereof laid down "that the office of pleader in the Courts of the East India Company shall be open to all persons of whatever nation or religion, provided that no person shall be admitted as a pleader in any of those Courts unless he has obtained a certificate, in such manner as shall be directed by the Sudder Courts, that *he* is of good character and duly qualified for the office". Here, again, there is no indication that women might be legal practitioners, while section 12, like section 4, uses language appropriate only to *men* practitioners. Before I pass on to the next stage, I may mention that the history of the institution of a legal profession in the Courts of the East India Company is lucidly set out in the great work on the Bengal Regulations by John Herbert Harington, for many years Chief Judge of the Sudder Court (see Vol. I, 1st ed., p. 147, which states the law as in 1809, and Vol. I, 2nd ed., p. 148, which states the law as it

stood in 1821). The next legislation on the subject was in 1865, when Act XX of 1865 came into force, on the 10th April, 1865. Regulation XXVII of 1814, in so far as it had not been already repealed, as also Act I of 1846, Act XVIII of 1852 and Act XX of 1853 were repealed; it may be stated parenthetically that the language used in those two Acts show that the Legislature contemplated men alone as legal practitioners. There is no indication whatever in Act XX of 1865 that the Legislature had in view a departure from what had unquestionably been the law from before 1793. On the other hand, section 5 and the form of certificate to be granted to pleaders as contained in the second schedule, make it manifest that in 1865, as in 1793, the Legislature contemplated *men* alone as legal practitioners. It is further worthy of note that this Act contains an interpretation clause; section 2 enacts that, "unless there be something repugnant or inconsistent in the subject or context, words" in the Act "importing the singular number include the plural, and words importing the plural number include the singular". This corresponds with what was subsequently enacted in section 2 (2) of the General Clauses Act (I of 1868); but we miss in Act XX of 1865 what does find a place in section 2 (1) of Act I of 1868, namely, the provision that words importing the masculine gender shall be taken to include females. The omission becomes significant, when we find that in the Indian Penal Code (Act XLV of 1860) enacted on the 6th October, 1860, the Legislature had in section 8 stated that the pronoun "he" and its derivatives are used of any person, whether male or female. The inference is legitimate that if the Legislature in 1865 had contemplated the admission of women as legal practitioners, they would have inserted in the interpretation clause a provision about gender

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as they did in 1860 in the case of the Indian Penal Code. It is not as if they were oblivious of this point. Take, for instance, Act XI of 1865 (Mofussil Small Cause Courts Act) which came into force on the 15th March, 1865, that is, less than a month before the Pleaders Act, 1865, came into operation; we find in the interpretation clause (section 1) a provision that "words importing the masculine gender include females." Take, again, Act X of 1865 (The Indian Succession Act) which came into force on the 16th March, 1865, that is, after the Small Cause Courts Act but before the Pleaders Act; we find, in the interpretation clause (section 3) a provision that words importing the male sex include females. This occurs along with a provision about number which reappears in the Small Cause Courts Act and in the Pleaders Act; the provision about gender, as we have seen, reappears in the Small Cause Courts Act, but not in the Pleaders Act. It thus looks as if the provision about gender had been deliberately omitted from the Pleaders Act. The contrast is emphasised when we take another Act passed a few days later on the 17th April, 1865, namely, Act XXIII of 1865 (Punjab Chief Court of Judicature Act), wherein in the interpretation clause (section 1), we find provisions about both number and gender. The position, then, is that in 1865, when there was no interpretation statute, when the Legislature used to insert interpretation clauses in various Acts, we find that in Acts made immediately before and after the Pleaders Act, words indicative of the male sex are expressly stated to include female sex, but there is no such provision in the Pleaders Act; the inference seems almost conclusive that the omission was intentional, and this conclusion is substantially strengthened when we find that from 1772 onwards men alone as legal practitioners were in the contemplation of

the Legislators; and although the Pleaders Act was amended on the 22nd December, 1865, by Act XXIX of 1865, no change was made in this direction. The Pleaders Act, 1865, was, as we have already seen, repealed by the Legal Practitioners Act, 1879, which was passed on the 29th October, 1879. Neither the preamble nor the provisions of any of the sections of the Act afford any indication of an intention on the part of the Legislature to widen the profession of pleaders by the admission of women into its ranks. I do not overlook the fact that the Act of Incorporation of the University of Calcutta (Act II of 1857) which came into force on the 24th January, 1857, authorised the Senate to confer degrees in various faculties inclusive of the faculty of law and that, notwithstanding the absence of an interpretation clause, the Act of Incorporation has been interpreted to authorise the University to grant degrees to men as well as to women in all faculties. There may obviously be weighty reasons why in the University Act words importing the masculine gender may be taken to include females, while in the Pleaders Act no such intention can reasonably be attributed to the Legislature: the subject-matters of the two statutes and the historical antecedents thereof are fundamentally different. For the reasons stated, I see no escape from the position that the Legislature in this country never contemplated the admission of women to the rank of legal practitioners.

Reference was made, in the course of argument, to the fact that, under the Common Law of England, women were under a disability to become attorneys or solicitors, and that the disability continued, notwithstanding the interpretation clause (section 48) of the Solicitors Act, 1843, which provides that words importing the masculine gender shall extend to a

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female: *Bebb v. Law Society* (1). The decision just mentioned, no doubt, does not directly assist us in the solution of the question we have to determine; but I think it furnishes valuable aid as to the mode in which the problem should be approached. Cozens-Hardy, M. R. referred to Lord Coke (Co. Litt. 128 a) to show that women were not allowed to be attorneys, and Lord Coke in his turn relied upon the Mirror of Justices (Book II, Chapter 31, Selden Society's Ed., p. 88; Robinson's Ed., p. 137) to show that "the law will not suffer women to be attorneys." The Master of the Rolls then observed that no woman had ever been an Attorney-at-Law or had applied to be or attempted to be an Attorney-at-Law. The Solicitors Act, 1843, did not in express terms destroy a pre-existing disability or confer a fresh and independent right; consequently, notwithstanding the interpretation clause in the Solicitors Act, 1843, which had to be construed with the previous legislation and the common law, it could not be successfully maintained that the Legislature had departed from what had been the constant practice and inveterate usage. [See also the judgment of Willes J., in *Chorlton v. Lings* (2)]. The line of argument which was unsuccessfully adopted in the case of *Bebb v. Law Society* (1) has sometimes found favour in the Courts of the United States, but has been on other occasions emphatically repudiated. It is not necessary for my present purpose to review in detail the conflicting principles applied in the different Courts of the United States in the determination of this question; but an examination of their decisions, which are by no means harmonious, discloses that the same difficulty has been felt there as

(1) [1914] 1 Ch. 286.

(2) (1868) L. R. 4 C. P. 374, 390.

elsewhere as to the inference properly deducible from the circumstance that women have not hitherto entered the ranks of the legal profession. In favour of allowing women to practise law under old statutes which mentioned men only, the Courts have reasoned, *first*, that every word importing the masculine gender only may extend to and be applied to females [*In re Thomas* (1)]; *secondly*, that statutes, whenever they might have been passed, should be construed as if they were recently enacted and not with reference to what was in the mind of the Legislature at the time of their enactment [*In re Hall* (2)]; *thirdly*, that all statutes are to be construed, as far as possible, in favour of equality of rights, and that all restrictions upon human liberty and all claims for special privileges are to be regarded as having a presumption of law against them [*In re Leach* (3), *In re Hall* (2)]; and, *fourthly*, that the status of women has, in the eye of law and in popular acceptance, so changed as not only to permit their admission to the Bar but practically to demand it [*In re Thomas* (1); and *In re Hall* (2)]. In refusing to admit women to practise law, the reasoning employed is substantially the opposite of that which favours their admission to the Bar, namely, *first*, that words importing the masculine gender cannot be read so as to include women, unless the subject-matter and the context justify such a construction [*In re Maddox* (4)]; *secondly*, that as the Legislature never contemplated the admission of women, as indicated by the history of the profession, words of masculine gender in the statutes should not be interpreted to include

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(1) (1891) 16 Colo. 441 ;
13 L. R. A. 528.

(2) (1882) 50 Conn. 131 ;
47 Am. Rep. 625.

(3) (1893) 134 Ind. 665, 671 ;
21 L. R. A. 701.

(4) (1901) 93 Maryland 727 ;
55 L. R. A. 298.

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women [*In re Robinson* (1); *In re Leonard* (2), *In re Godell* (3)]; *thirdly*, that an extended interpretation should not be put on statutes, because women are generally unfitted for the duties of the legal profession [*In re Bradwell* (4) and *In re Lockwood v. United States* (5)]; and *fourthly*, that if the status of women has altered in the eye of law and in popular acceptance, the proper remedy is legislation and not an alteration of the law in the disguise of judicial exposition of the existing law [*In re Maddox* (6), *In re Robinson* (1), *In re Leonard* (2), *In re Bradwell* (4), *Ex parte Griffin* (7)]. The most powerful opinion in the Courts of the United States against the construction of a statute in terms applicable to men only, so as to confer a new privilege upon women, is that of Chief Justice Gray in *In re Robinson* (1), where he emphasised the impropriety of an extended construction of a statute in the absence of all indications of an intention on the part of the Legislature to reverse the policy of their predecessors or to introduce a fundamental change in long established principles of law. To the same effect are the weighty words of Lawrence J. in *In re Bradwell* (4). "Female Attorneys-at-Law were unknown in England, and a proposition that a woman should enter the Courts of Westminster Hall in that capacity or as a Barrister would have created hardly less astonishment than one that she should ascend the Bench of Bishops or be elected to a seat in the House of Commons. If it is maintained that a change of so radical a character has been effected in the law, it must be shown that there is express

(1) (1880) 131 Mass. 376 ;
41 Am. Rep. 239.

(2) (1885) 12 Oregon. 93 ;
53 Am. Rep. 323.

(3) (1875) 39 Wisconsin 232 ;
20 Am. Rep. 42.

(4) (1870) 55 Ill. 535.

(5) (1873) 9 Ct. Cl. 345.

(6) (1901) 93 Maryland 127 ;
55 L. R. A. 298.

(7) (1901) 71 S. W. 746.

legislation to that effect" [see also *Bradwell v. Illinois* (1), and *In re Lockwood* (2), where the Supreme Court of the United States held that in view of the familiar history of the constitution of the profession, the term "person" or "citizen" in a statute relating to the enrolment of attorneys and counsellors at law could not be deemed to include a woman]. The question was elaborately discussed recently by a Full Bench of the Supreme Court of New Brunswick in the case of *Re French* (3), and the Court came unanimously to the conclusion that statutory authority in express terms is necessary to enable a woman to be admitted to the rank of the profession; in other words, that the intention of the Legislature to make a radical change must be made out beyond doubt.

It will be noticed that Swinfen Eady L. J., in his judgment in the case of *Bebb v. Law Society* (4) applied to the matter before him the following passage from the speech of Lord Loreburn, L. C., in *Nairn v. University of St. Andrews* (5): "not only has it been the constant tradition, alike of all the three kingdoms, but it has also been the constant practice, so far as we have knowledge of what has happened from the earliest times down to this day. Only the clearest proof that a different state of things prevailed in ancient times could be entertained by a Court of Law in proving the origin of so inveterate an usage."

It is interesting to investigate the matter from the point of view thus indicated. We have seen that ever since the foundation of British Courts in this country in 1772, women have never been admitted to the rank of legal practitioners. It is by no means easy to determine with absolute certainty whether women were

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(1) (1872) 16 Wallace 130.

(3) (1905) 37 N. B. 359.

(2) (1893) 154 U. S. 116.

(4) [1914] 1 Ch. 286, 296.

(5) [1909] A. C. 147, 160.

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recognised as legal practitioners in Hindu or Mahomedan Courts in this country. As regards Hindu Courts, it is clear that the legal profession existed in the seventh century of the Christian era, when Asahaya wrote his commentary on the Institutes of Narada (see the edition of Narada Smriti, edited by Jolly, for the Bibliotheca Indica series, Book I, verse 6, page 48, Sacred Books of the East Series, Vol. XXXIII, p. 43; see also Introduction, section 2, verse 22; S. B. E., Vol. XXXIII, p. 29). To the same effect are texts of Vrihaspati, Katyayana and Vyasa quoted by Raghunandan in his Vyabahara Tatwa. It is also fairly clear from Buddhistic books that the profession of lawyers existed in the first century before the Christian era; they were known as "sellers of law" or traders of law," who "explained and re-explained, argued and re-argued" (Milinda Panho, Book V. 23; Trenckner's Edition, pp. 344-345; translation by Rhys Davids, Sacred Books of the East, Vol. XXXVI, pp. 236-238). There are also references to pleaders in the Dhammathats or the Laws of Menoo (Richardson's Laws of Menoo, p. 50). Similarly, the Sukraniti (IV 5, 10, 13, 26, 80-82) mentions pleaders. It is remarkable that wherever pleaders or advocates are so mentioned, the reference is to men and not to women. I cannot find any instance where, in Hindu or Buddhistic times, the jurists contemplated the possibility of women as members of the legal profession. As regards the Courts in Mahomedan times in this country, I have not been able to obtain any information. But I am not unmindful that there are indications that the legal position of women under the Islamic Law as administered in countries beyond India was based on very advanced conceptions. Thus, Syed Ameer Ali observes, in his lecture on the Legal Position of Women in Islam (p. 21), that Abu

Hanifa, the founder of the Hanifa school of Mussalman Law, had declared in the eighth century of the Christian era, that a woman was entitled to hold the office of Judge or Kazi equally with a man. Al Suyuti in his history of the Caliphs (*Tarikh al-Khalafa*, p. 391) states that Sha'ab or Shaghab, the mother of the Abbasid Caliph Al-Muqtadir (295 A. H. = 907 A. D.) herself presided at the High Court of Appeal, listened to applications, surrounded by Qadis and Dignitaries of State, and issued edicts in her own writing. In the celebrated *Maqamat* or Assemblies of Al Hariri (Assembly IX tr. Chenery and Assembly XL tr. Steingass, both in the Oriental Translation Fund, New Series), we find instances of women litigants appearing before Qadis, and holding their own against their husbands or other male adversaries (see also *Kitab al-Adhkiya* of Ibn-al-Jawzi published in Cairo, which records many instances of women litigants appearing before Caliph Omar, Abu Hanifa, and other eminent doctors of Mahomedan Jurisprudence). Even in Islam, however, there have been rifts, and the author of the well-known work *Al-Ashah Wab'l Naza'ir* (Analogies and Precedents, Lucknow Edition, p. 507) urges that women should not be invested with the office of Qadi, though it may be lawful and valid for her to hold the appointment, excepting matters of Criminal Law. The substance of the matter is that no trace of women legal practitioners can be found in Hindu or Buddhistic times, and though the Islamic Law may have tolerated the appearance of women litigants in Court and possibly the appointment of women as Judges, there is no trace of women legal practitioners in the Courts of this country during the Mahomedan period. When the British Courts were first constituted in 1772, the rulers found men alone as legal practitioners, and when in 1793, for reasons

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assigned in the preamble to Regulation VII, the profession was, as it were, reorganised and given a recognised legal status, the Legislators contemplated men alone as members of the profession. There has never been a departure from that policy. It is impossible for us to hold that, on the law as it stands, women are entitled to be admitted to the ranks of the legal profession; when I say this, I do not forget that our duty as Judges of this Court is strictly limited to a declaration of the law as it is; whether any change in that law would be wise or expedient is a question, not for the Court, but for the Legislature. In my opinion, there is no possible escape from the conclusion that the application must be refused.

CHITTY J. This is an application made by Miss Regina Guha under Rule 18 of the Rules framed by this Court under section 6 of the Legal Practitioners Act (XVIII of 1879), praying that she may be enrolled as a pleader and permitted to practise as such in the subordinate Courts of the 24-Perganas. It is conceded that she possesses the necessary qualifications required by the Rules and that she has paid the fees prescribed by Rule 27. The only question is whether, as the law and our Rules now stand, a person of the female sex can be admitted as a pleader. We are not here to say what we think the law ought to be, but what it is. Counsel for the petitioner based his argument on the interpretation to be placed on the word "person" and the pronouns following it in the Legal Practitioners Act of 1879. By section 2 (1) of the General Clauses Act, I of 1868, which governed the Act of 1879, "words importing the masculine gender shall be taken to include females." It was agued that by virtue of this provision the word "person" in the Act of 1879 must be taken to mean a person of either sex, the pronouns

following and referring to the words "he," "him", "his," being read as "he" or "she," "him," or "her," "his" or "hers," and so forth. The same argument was used without success in the case of *Bebb v. Law Society* (1), where a lady in England was desirous of being admitted as a solicitor. Section 48 of the Act of 1843, under which she applied, contained a similar provision. It was, however, pointed out that that section, like section 2 of the General Clauses Act of 1868, is only to be employed, where there is nothing repugnant in the subject or context. It was held in that case that, inasmuch as there had never been a solicitor of the female sex, the Act of 1843, which neither created a new right nor removed an existing disability, did not contemplate such a contingency. So in the case before us, the Legal Practitioners Act of 1879 was not framed to create a new profession, but to regulate one which had been in existence for many years. The first regulation which we find dealing with pleaders as a profession is Regulation VII of 1793. This described them as "men" and provided that they must be Hindus or Mahomedans. Successive Regulations and Acts were passed, in which no doubt the class of persons eligible was gradually widened and enlarged, but in which there was never any question as to the sex of the profession. Thus we find Regulation XXVII of 1814, Act I of 1846, Act XVIII of 1852, and Act XX of 1865, all dealing with the subject. Before the passing of the General Clauses Act of 1868, it was necessary to have a special section providing that words importing the masculine gender should be taken to include females (*e.g.*, Indian Penal Code, Act XLV of 1860, section 8). No such section is to be found in any of the Regulations or Acts above referred to. Although in India in the matter of

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pleaders we may not be able to go back so far as they did in England in the matter of solicitors, we find that the profession of pleaders has been in existence for over 120 years as a profession, and that never during that period did any woman become enrolled or so far as we know, apply to be enrolled, as a pleader. We may therefore conclude that in passing the Legal Practitioners Act of 1879, the Legislature did not contemplate the enrolment of pleaders of the female sex, and to read the Act to include females would be certainly repugnant to the subject. I feel some doubt whether the General Clauses Act can apply to Rules framed by this Court. No doubt, in framing such Rules under an Act of the Legislature, the Court should not use any particular expression or word in a different sense to that applied to the particular expression or word by the Act itself. But this does not mean that in framing those Rules the Court must be taken to have framed them for women as well as men. The Rules were framed to meet existing circumstances, that is to say, a profession of pleaders consisting entirely of men, and cannot by implication be read as including pleaders of the opposite sex. It has not been, and indeed could not successfully be, argued that the Rules as they stand are *ultra vires*. As the law stands, I am of opinion that a woman cannot be enrolled as a pleader. I therefore agree that the application should be refused.

TEUNON J. I agree in the judgment that has been delivered by the learned Chief Justice and have nothing further to add.

CHAUDHURI J. I also agree in the judgment delivered by the learned Chief Justice and have nothing further to add.

S. M.

Application refused.

CRIMINAL REVISION.

Before Sanderson C. J. and Richardson J.

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v.

EMPEROR.*

Stamp-duty—Mere fact of putting a stamp not of proper value, whether an offence—Stamp Act (II of 1899), ss. 64, cl. (c), 68—Intention to defraud.

In construing clause (c) of s. 64 of the Indian Stamp Act, the words "any other act" must be taken to mean an act of a like nature to those which are specified in clauses (a) and (b); and the mere fact that a person puts a stamp on a document which he knows to be not of proper value would not come within clause (c) of section 64, unless there is an intention to defraud the Government.

Queen-Empress v. Somasundaram Chetti (1) referred to.

RULE obtained by Chhakmal Chopra and another, accused.

The petitioner No. 1 was a pleader practising in the Calcutta Small Cause Court, but he had a joint family business at Mahiganj in the district of Rangpur in connection with his cousin, the petitioner No. 2. The petitioners brought a suit in the Court of the Munsif, 2nd Court, at Rangpur against one Lal Mahomed Barkandaz for the recovery of a sum of money due on a *hatchitta* in connection with transactions of the said business. But the Munsif being of opinion that the said *hatchitta* was virtually an agreement and that the stamp of one-anna affixed thereon by the plaintiff was insufficient, ordered the said document to be impounded and directed the petitioners to pay the

* Criminal Revision, No. 670 of 1916, against the order of B. N. Mukerjee, Subdivisional Officer of Rangpur, dated June 2, 1916.

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proper duty of 8 annas, together with a penalty of Rs. 5, which was done. On the 18th March 1916, the Deputy Collector ordered the claimants and executant to show cause why they should not be prosecuted under section 62(i) of the Stamp Act. On the 20th April 1916, the Deputy Collector ordered the production of the *khata* book, which was in the possession of the claimants, and as he failed to do so, on the 10th May 1916, suggested the prosecution of the claimant under section 64(c) of the Stamp Act. On the 22nd May 1916, the Collector ordered the prosecution of the claimants under section 64(c) of the Stamp Act. On the 31st May 1916, the District Magistrate transferred the case to the Sadar Subdivisional Magistrate for trial who issued summons on the 2nd June 1916. Being aggrieved by these two orders of the 31st May and 2nd June the petitioners moved the High Court.

Babu Manmatha Nath Mukerjee, for the petitioners. The petitioners are money-lenders and took a *hatchitta* from a debtor. Refers to s. 64, cl. (c) of the Stamp Act (II of 1899). The Munsif thought that a one-anna stamp was insufficient as an eight-anna stamp was necessary, it being an agreement, and inflicted a penalty of Rs. 5, being 20 times the value of the proper stamp. I submit that the liability of paying stamp-duty was on the debtor. That suit is pending and I am now ordered to be prosecuted for not paying the duty I was required by law to do. I submit *first*, I have not done anything to evade payment of duty and there is no intention to defraud the Government, which is the element of the offence under section 64, clause (c). *Secondly*, I have not committed any offence. It may be that the debtor has: *Queen-Empress v. Nihal Chand* (1).

Mr. Gregory (Junior) for the Crown. There can be no doubt that the accused, who carried on a loan-business, knew that an eight-anna stamp was required, therefore their intention was to defraud Government: see s. 64, clause (c). Section 61 provides for penalty. (See proviso also.) Intention is to be inferred from petitioners' act, and therefore it is abetting. This is a matter of great moment to Government, and that is the reason for Government taking it up.

[RICHARDSON J. Suppose I accept a receipt without stamp.]

There is absolutely no other way of proving intention in such cases.

[SANDERSON C.J. The Collector must show that it is an offence against the stamp law; and that the intention was to defraud Government.]

The trial has not begun yet—the prosecution has only been sanctioned, and, if there is a conviction, all this can be gone into then. A receipt for money would ordinarily require a one-anna stamp, but such a document requires an eight-annas stamp: see *In re Jamnadas Harinaran* (1).

Babu Manmatha Nath Mukerjee, in reply. The receiver of an unstamped or insufficiently stamped document cannot be prosecuted under section 61 as abettor even, vide *Queen-Empress v. Nihal Chand* (2). Nobody says I put the stamp there. The law requires the debtor to stamp an agreement as I stated it.

Section 29 of the Stamp Act requires the expenses as to stamp to be borne by the debtor. Section 5, cl. (b). There is no provision in the Stamp Act as to the person who is to pay duty on an agreement. What ordinarily happens is that the penalty when received is added to the costs the defendants will have to pay under the decree.

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[SANDERSON C.J. The law puts the penalty on the person who produces the document personally and it cannot be passed on to another under the decree.]

But originally it is payable by the debtor. In any case section 62 has no application. There is no reported case in point, and I am using as my argument the remarks of Mr. Donough in his book on the Stamp Law, 5th ed., p. 211 (or 4th edition, p. 198), *re* section 64. *Vide* also *Queen-Empress v. Somasundaram Chetti* (1). In conclusion I submit that the execution of a document is not an act mentioned in section 68 and therefore cannot be such an act as is mentioned in section 64 which is wider.

SANDERSON C.J. We think that this Rule should be made absolute.

The charge against the two petitioners was under section 64(c) of the Indian Stamp Act (II of 1899) which says that "Any person who, with intent to defraud the Government does any other act calculated to deprive the Government of any duty or penalty under this Act shall be punishable with fine which may extend to five thousand rupees."

Now, what happened in this case was that the petitioners alleged that they had lent money to one Lal Mahomed Barkandaz, and Lal Mahomed had signed an undertaking in one of the petitioners' books to this effect: "I shall pay interest on this *hath-chitta* up to date of realization at the rate of Rs. 3 per cent. per mensem. (Sd.) Sri Lal Mahomed. That document was stamped with a one-anna stamp. When it was necessary for the petitioners in certain proceedings against Lal Mahomed to put in this document, an objection was taken by the officer of the Court that it was not duly stamped; and the result was that the petitioner

had to pay the proper amount of stamp and penalty which amounted to Rs. 5. Then the Collector, when he had this matter brought to his attention, directed that the petitioners should be prosecuted under the section which I have read and summons was issued by the Magistrate to the petitioners in that respect.

A Rule has been obtained in this Court by the petitioners on the grounds, *first*, that on the facts and circumstances of the case no offence under section 64(c) had been disclosed; and, *secondly*, that there being nothing to show that there was an intention of evading the payment of the proper duty, the Collector ought not to have directed a prosecution in the case.

The act relied on by Mr. Gregory, who appears on behalf of the Crown, is this: He says that the petitioners who were people carrying on money-lending business must have known when they put the stamp upon the document, that it was not a stamp of sufficient value; and, therefore, they must have intended to evade payment of the proper duty.

The first point that was taken by Manmatha Nath Mukerjee was that it was not the duty of the petitioners to put on the stamp at all, and that it was the duty of the debtor to put on the stamp. But inasmuch as it was an agreement, and the stamp required was that applicable to an agreement, there is no provision in the Stamp Act as far as I am able to find, which provides that in such a case it is the duty of the debtor to put on the stamp, and inasmuch as this acknowledgment was made in the books of the petitioners themselves I think it is fair to assume that in all probability they were the parties to put the stamp upon the document.

Then the learned vakil for the petitioners takes a further point. He says that the mere fact of putting a stamp upon a document which is not of proper value,

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even though the party who puts that stamp knows that it is not of the proper value, is not an act which comes within clause (c) of section 64. I agree with him. Clause (c) comes after two other clauses; and the section must be read as a whole to understand the meaning of clause (c). The section runs thus: "Any person who, with intent to defraud the Government, (a) executes any instrument in which all the facts and circumstances required by section 27 to be set forth in such instrument are not fully and truly set forth; or (b) being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all such facts and circumstances; or (c) does any other act calculated to deprive the Government of any duty or penalty under this Act; shall be etc., etc." The learned pleader's argument is that in construing clause (c) it is right to say "that any other act" must be taken to mean an act of a like nature to those which are specified in clauses (a) and (b). I think that is the proper construction to put upon the section; and, if that be so, then the mere fact that a person puts a stamp on a document which he knows is not of proper value, would not, in my judgment, come within clause (c) of section 64.

It is argued by the learned counsel for the Crown that unless the construction, for which he contends, be put upon clause (c), it would be a very serious thing for the Revenue authorities, and they will have no means of punishing a man for wrongly stamping a document. But I do not think that weighs with us very much because if one looks at section 62 (1), paragraph (b) one finds that at all events a person, who signs a document which is chargeable with duty without the same being duly stamped, is liable to be prosecuted for an offence under that section; and the

Revenue authorities, if they think right, can proceed against a person who signs such a document without a proper stamp being put upon it. I am confirmed in the judgment at which I have arrived by the decision of the Madras High Court in the case of *Queen-Empress v. Somasundaram Chetti* (1). It is true that the learned Judges there were not concerned with the particular section, but they were considering section 67 which practically corresponds to section 68 of Act II of 1899; and the reasoning which the learned Judges applied in that case is exactly the reasoning which appeals to me in this case.

For these reasons I think that the Rule should be made absolute.

RICHARDSON J. I have come to the same conclusion. I think that the act charged is not an act which comes within clause (c) of section 64 of the Indian Stamp Act.

G. S.

Rule absolute.

(1) (1899) L. L. R. 23 Mad. 155.

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v.

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(AND CROSS-APPEAL CONSOLIDATED).

P.C.²
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Aug. 1.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Waste Lands Act (XXIII of 1863) s. 18—Procedure under that Act—Sale by Government of lands under the Act—Error in advertisement of Sale—Absence of proof of proclamation ousting jurisdiction of ordinary Courts and constituting a Special Court—Three years' limit for claims only applicable to proceedings before Special Court—Act applied to other lands than those only held by Government.

Great weight had always been given by the Judicial Committee to the accuracy of survey maps : they were not conclusive, but in the absence of evidence to the contrary they will be presumed to be accurate.

This appeal arose out of a suit by the Maharajah of Tipperah to recover possession of certain plots of land in Sylhet from the Government and from certain Tea Companies who in virtue of leases granted by the Government were in possession of the lands in suit. There were concurrent findings of fact by the Courts in India that the lands in question were *de facto* in the possession of the plaintiff and his predecessors since the beginning of the 19th century ; and that the dispossession had taken place within 12 years before suit so as to exclude the plea of limitation : and the Judicial Committee substantially upheld the decision of the High Court in favour of the plaintiff.

One plot, however, had been sold by the Government as waste land and the sale was not in any way stopped or interfered with by the Rajah, and more than three years had elapsed from the date of delivery to the purchaser, which was the period provided by section 18 of the Waste Lands Act (XXIII of 1863) after which no "claim to any land, or to compensation or damages in respect of any land sold as waste land could be

* *Present* : LORD DUNEDIN, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

received"; and it was contended that the suit was barred by section 18 as to that plot.

Held, that the Act was one which was drastic in its character and made great invasion on private rights. The defendant who pleaded it must therefore bring the matter strictly within its provisions which clearly pointed to the necessity of proper intimation being given by Government as to the proposed sale, and where they had given a misleading notice and had advertised a sale of lands in one district when they were situated in another district, the whole of the sale proceedings failed for want of a proper basis.

When a claim was allowed under the Act, procedure was provided for the issue of a proclamation which ousted the jurisdiction of the ordinary Courts and constituted a Special Court, and no proof had in this case been given that any proclamation was issued. The provision as to three years in section 18 was clearly applicable to the proceedings before the Special Court and that Court alone.

The procedure under the Waste Lands Act is not applicable only to lands belonging to the Government.

APPEALS Nos. 126 of 1911, and 4 of 1912. Appeal and Cross-Appeal consolidated, from a judgment and decree (22nd May, 1908) of the High Court at Calcutta, which affirmed a judgment and decree (15th April 1905) of the Subordinate Judge of Sylhet.

The defendant No. 1, the Secretary of State for India in Council, was the appellant to His Majesty in Council.

The main question for determination in these appeals was the title of the plaintiff the Rajah of Tipperah (respondent and cross-appellant) to certain areas of land (plots 1, 2, 3, 4, 5) situate in the district of Sylhet, located in Tappa Bishgaon, Perganah Taraf, though prior to the decennial settlement in the district of Laskarpur, which was afterwards incorporated in Sylhet. Tappa Bishgaon was divided into two taluks, a two-anna share being called Sarbamangala No. 1335, and the remaining 14-anna share being named Ram Pershad No. 1081. These two taluks were purchased in 1805 and 1809, respectively.

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by the predecessor in title of the Rajah of Tipperah, from persons with whom the permanent settlement had been made.

Another pergunah in the district of Sylhet was known as Bijura, and in the first Court it was disputed whether the lands in suit were situate in Perganah Taraf or Perganah Bijura. Reports were asked for in 1802 of lands in the district of Sylhet of which no settlement had been made and such lands when found were called "Ilam" lands. More inquiries between 1802 and 1807 led to the finding of other such lands which were called "Taufir" for which leases, known as "Halabadi" pottahs were granted by Government. These last-mentioned lands and "Ilam" lands are both to be found in Perganah Bijura, but neither is to be found in Perganah Taraf. A "Halabadi" pottah, among others, was granted on 27th April 1907 by the Collector of the Sylhet district to one Ram Chandra Dat, the eastern boundary of the land granted being described as "Dopania Mora, that is to say the limits of the Hills of the Rajah of Tipperah, and Perganah Taraf." The Government acquired the land covered by this grant in 1826, which was called Halabadi Mahal No. 1.

In 1821 Lieutenant Fisher was deputed to survey and mark the exact frontier line of the independent Raj of Tipperah as to which disputes had arisen. In 1822 he sent in a report in which (*inter alia*) he stated that the hills adjacent to and eastward of Perganah Bijura were in possession of the Rajah of Tipperah and not of the Government. This was confirmed by Mr. Reynolds in May, 1861, who, being an officer specially deputed to make a survey, stated in his report that he had definitely fixed the position of Dopania Mora, and that, as to the lands east of it claimed as part of Halabadi Mahal No. 1, a large part

of the lands of that mahal were in possession not of the ijaradar of the Government, but of the Rajah of Tipperah, "as stated long ago by Lieutenant Fisher."

Between 1859 and 1865 a thakbast and revenue survey of the district was made. The cultivated and easily accessible areas of Tappa Bishgaon were marked, and boundaries allocated to various villages. The tract of country between the eastern boundary of Perganah Bijura, namely, Dopania Mora and the western boundary of the Rajah's villages as marked by the thakbast surveyors, notwithstanding the protests of the Rajah, had a separate map prepared for it. This tract of country was now called the Raghunandan Hills, but the alteration of the name did not change the possession which had all along been with the Rajah.

At various times subsequent to 1880, the Government granted leases or sold various plots of waste land, and the lessees or purchasers encroached on plots of land which were in possession of the Rajah, and to which he claimed title. In consequence Maharajah Radha Kishore Manikya, the then Rajah of Tipperah, on 21st September 1898, instituted the suit out of which these appeals arose to recover possession of the eight plots of land in dispute. As to plots 6, 7 and 8 the claim was compromised and is not the subject of the appeals.

The defendants to the suit were the Secretary of State for India in Council, and various Tea Companies who derived their title from the Government.

The defence of the Secretary of State, defendant No. 1, was that plots 1, 2, 3 and 4 were the absolute property of Government, being situate in Perganah Bijura within the boundaries of the Halabadi estates, and that plot 5 was situate in the Satgaon-Dinarpur

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Hills outside the limits of the Rajah's estates; that the suit was barred by limitation, as neither the plaintiff, nor his predecessors in title had been in possession within 12 years of the date of the institution of the suit; and it was stated that plot 1 was included in the grant to the Chandichera Tea Estate, plots 2 and 3 in the grant to the Amu Tea Estate, and plot 5 in the grant to the Rema Tea Estate (now the Imperial Tea Company). The defences of the Tea Companies was substantially to the same effect. The Amu Tea Company did not appear.

The issues so far as now material were as follows:—

(4) Whether the plaintiff's claim is barred by limitation?

(5) Whether the provisions of Act XXIII of 1863 bar the suit?

(7) Whether the plaintiff's predecessors in interest acquired a good title by reason of adverse possession for more than 60 years, irrespective of any question of perganahs and mahals?

(8) Whether the disputed lands appertain to any of the estates mentioned in Schedule I to the plaint?

(10) Whether the plaintiff is entitled to recover possession of the land in suit from the defendants?

The Subordinate Judge held on issue 4 that the plaintiff had been in possession in 1822, in 1861, and also within 12 years of suit of all the plots of land except plot 1, of which the Chandichera Tea Estate had taken possession in 1880. He was of opinion that the suit was therefore barred by limitation as to plot 1, but was not barred as to the other plots. On issue 5 he decided that the suit was not barred by the provisions of the Waste Lands Act (XXIII of 1863), nor, as was suggested in the argument before him, by the Forest Act (VII of 1878). He made no formal

finding on issue 7. On issue 8 he found that the Dopania Mora was the boundary between Perganah Taraf in which the plaintiff alleged the lands in dispute were situate, and Perganah Bijura in which the defendants alleged the locality of the disputed areas to be; that all the plots claimed were to the east of the Dopania Mora, and were consequently in Perganah Taraf; that the plaintiff as owner of Tuppa Bishgaon, was entitled to recover lands which were situate within the ambit of his permanently settled estates; and that the thakbast and revenue maps were no evidence to show that the "Raghunandan Hills" were excluded from their area. On issue 10, he held that plot 2 was not covered by the grant to the Amu Tea Estate, and that as the Amu Tea Estate and the Rema Tea Estate took their grants in the *bona fide* belief in the title of the Government, they should not be ejected from plots 3 and 5, but should pay rent to the plaintiff. The Subordinate Judge accordingly made a decree dismissing the suit as to plot 1, and giving the plaintiff possession of plots 2 and 4 absolutely, and plots 3 and 5 subject to the condition mentioned.

From that decision the Secretary of State appealed to the High Court, and the Rajah filed objections thereto under section 561 of the Civil Procedure Code, 1882.

The High Court (CASPERSZ and COXE JJ.) affirmed the decision of the Subordinate Judge that the suit was not barred either by the provisions of Act XXIII of 1863 or of Act VII of 1878, and further held that it was not barred by the extension of the Sylhet Jhum Regulation, 1891, to Perganah Taraf. The High Court also affirmed the findings of the first Court that the lands in dispute were situate in Tuppa Bishgaon, and that plot 5 was situate within the boundaries of

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the Rajah's permanently settled estates. With regard to plots 1 to 4 the High Court was of opinion that they formed portions of Perganah Taraf, of which no settlement had ever been made, and were not included in the taluks of which the Rajah was owner: but the High Court nevertheless affirmed the decree of the Subordinate Judge on the ground that the plaintiff had established a title by adverse possession for a period of over 60 years. On the question of limitation raised in issue 4, the High Court agreed with the first Court, and refused to consider the cross-objections so far as they related to questions between respondents to the appeal filed by the Secretary of State. The appeal and cross-appeal were in the result dismissed with costs.

On these appeals,

Sir H. Erle Richards, K. C., and *A. M. Dunne*, for the Secretary of State for India, appellant in appeal 126 of 1911 and respondent in appeal 4 of 1912, contended that the plaintiff respondent had not established that plots 1, 2, 3 and 4 formed any portion of his permanently settled estates. He had not proved possession adverse or otherwise for a period of 60 years prior to the defendants' admitted possession of those plots, and had not established any right or title thereto by such possession or otherwise; and his claim to those plots was barred by limitation. Reference was made to the Limitation Act (XV of 1877), section 28, and Schedule II, Articles 144 and 149. Even if he had possession for 60 years, it was not adverse to the Government. His claim to plot 3 was barred by the 12 years' rule of limitation. Reference was made to *Radhammi Debi v. Collector of Khulna* (1),

Mohini Mohan Roy v. Promoda Nath Roy (1), *Wali Ahmed Chowdhry v. Tota Meah Chowdhry* (2) and *Trustees, Executors and Agency Co. v. Short* (3). As to the value of survey maps as evidence of title, and possession, at the time of the survey, *Nobo Coomar Doss v. Gobind Chunder Roy* (4) was cited. It was also contended that the suit was barred by the Waste Lands Act (XXIII of 1863), and *Kristo Chunder Dass v. Steel* (5) was referred to. Notification under section 8 of the Act excluded the jurisdiction of the ordinary Courts. The suit was also barred by the notification made under the Forests Act (VII of 1878).

DeGruyther, K. C., and *J. M. Parikh*, for the plaintiff-respondent in appeal 126 of 1911, and appellant in appeal 4 of 1912, contended that the plaintiff had established his title to the lands in suit as forming portions of his permanently settled estates. There were concurrent decisions of fact that plot 5 was situate within the ambit of those estates. He had also established a title to the whole of the lands in dispute by adverse possession; and both Courts below had concurred in finding that he had been in undisturbed possession since early in the 19th century. The suit was not barred by limitation, and the finding against the plaintiff in regard to plot 1 was erroneous. The plaintiff was entitled to a decree giving him unconditional possession of plots 2 and 4 held by the Amu and Rema Tea Estates, and the High Court had wrongly refused him relief on the cross-appeal filed in the High Court. The suit was not barred by the provisions of Act XXIII of 1863 or Act VII of 1878 or of the Sylhet Jhum Regulation III of 1891. Reference was made to *Lelanund Singh v.*

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- (1) (1896) I. L. R. 24 Calc. 256, 257. (3) (1888) L. R. 13 A. C. 793.
(2) (1903) I. L. R. 31 Calc. 397, 405. (4) (1881) 9 C. L. R. 305.
(5) (1885) I. L. R. 12 Calc. 279.

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Government of Bengal (1); Baden Powell's Land Revenue Manual, page 167; Imperial Gazetteer of India, Vol. XXIII, Ed. 1908, pages 195—199; Bengal Regulation II of 1819. Preamble and sections 1 and 3; Regulation IX of 1825, section 1 and section 2, clause (3); Waste Lands Act (XXIII of 1863), sections 1 to 8 and section 18. If a proclamation has to be made, from the date of which the jurisdiction of the ordinary Courts was excluded, there has not been one. A proclamation cannot be presumed, nor can any date be assumed for it. The Government have not produced the proclamation or given the date of it.

E. U. Eddis, for the Tea Estates Companies, respondents 3 and 4.

Sir H. Erle Richards, K. C., in reply. Section 7 of the Waste Lands Act imposed a specific obligation on the Local Government to issue a proclamation; and it must be presumed that the Local Government had done it, as it was their duty to issue it. The fact of the jurisdiction being taken away made no difference. [LORD DUNEDIN. you did not plead that point, did you?] There was an issue raised on it—issue 5—and a decision on it by the Subordinate Judge. The High Court did not think it necessary to decide it. The maps and surveys have not been challenged before; the plaintiff, it was submitted, was bound by them and by the boundaries laid down in them.

The judgment of their Lordships was delivered by
 LORD DUNEDIN. The present suit was instituted
Aug. 1. by the Maharajah of Tippera to regain possession of certain plots of land in Southern Sylhet. The defendants are the Secretary of State for India and certain Tea Companies, who in virtue of leases granted by the Government are at present in possession of the lands in dispute.

There were several plots in controversy, but the judgment of the Court below has been so far acquiesced in that the only ones still in controversy before this Board were those known as plots 2, 3 and 4.

The Maharajah of Tippera is an independent Chief whose territory borders upon and adjoins the district of Sylhet. The configuration of the country is that there are several parallel ranges or spurs of hills going northward from the higher ground of independent Tippera, and forming valleys between the spurs. Originally the Rajahs of Tippera claimed that all the hill country to the end of the spurs was independent territory. Owing to this claim, Lieutenant Fisher was sent by the Government in 1821 to survey the ground and delimit the boundary. The outcome of his proceedings is preserved in a map and report. On the map he drew a line from west to east, which excluded from Tippera and incorporated in Bengal the spurs in question. His survey was so far as some parts of this line and the country adjoining admittedly incomplete, as the country was wild and covered by jungle; and difficulties were created by the opposition of hillmen known as Kukis, who acknowledged the supremacy of the Rajah of Tippera. This claim to an extension of independent Tippera seems to have been more or less persisted in by the Maharajah and his successors till 1861, when Mr. Reynolds, of the Survey Office, was sent to finally delineate on the ground the boundary line which Fisher had only drawn on the map. Since 1861 the line thus laid down has been acknowledged as authoritatively settling the boundary.

The plots of ground in question are all situated to the north of this boundary line, and are therefore admittedly no part of the independent territory.

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The position of the lands may be generally described as being in the southern portion of the land lying to the east of the westmost of the spurs of hills before mentioned. The land to the west of the said spur is known as the Pergunnah Bijura, while the land to the east of the same spur is known as the Pergunnah Taraf, in the southern portion of which lies the Tuppa Bishgaon. The Tuppa is sometimes also itself called a Pergunnah. These names existed at the time of Lord Cornwallis's settlement in 1793, and are to be found so marked in Fisher's map in 1821.

The plaintiff is admittedly owner of two taluks in Tuppa Bishgaon. He acquired them from persons who had bought them at a Government sale in 1799. It is common ground that these were and are settled lands.

The plaintiff accordingly framed his claims alternatively, and pleaded that the plots in question were either part of the settled taluks of Tuppa Bishgaon or otherwise that he had had 60 years' adverse possession of them.

The defence, on behalf of the Secretary of State, alleged that the plots in question were parts of a certain mahal of Halabadi lands in the Pergunnah Bijura.

The learned Subordinate Judge after receiving a report from a Commissioner to whom he remitted the task of examining the lands and comparing them with the various maps, and after considering evidence, oral and documentary, found that the said lands were parts of the settled lands of Tuppa Bishgaon. On appeal, the Secretary of State altered his line of argument. It had become apparent in the progress of the case that it was impossible to assert with success that the plots were within Pergunnah Bijura, and that consequently it was very difficult, if not impossible, to

assert that they were part of the Halabadi lands which undoubtedly were situate in Pergunnah Bijura. He therefore pinned himself to the negative attitude that at any rate they were not shown to be part of Tappa Bishgaon. To this negative attitude the Court of Appeal agreed, but they held that none the less the plaintiff had shown that the plots had been in the possession of the Rajahs for a period of upwards of 60 years, and that that possession had been adverse to all other claimants. Both Courts held that the dispossession complained of had happened within the period of 12 years before suit, so that the Act of Limitation did not apply. In the result, therefore, they dismissed the appeal.

Their Lordships do not propose to examine in detail the evidence which is very voluminous; they will, however, set forth a few of the salient points which they consider have been established.

(i) Pergunnah Taraf was not originally in the district of Sylhet, but in the district of Dacca. That district, unlike the district of Sylhet, was settled without survey. It is accordingly noticeable that while Pergunnah Bijura undoubtedly contains Ilam and Halabadi lands, Pergunnah Taraf does not seem to contain any such.

(ii) Pergunnah Bijura is undoubtedly to the west of the ridge of hills now called the Raghunandan hills.

(iii) Until such evidence as is afforded by the revenue survey of 1859, there is no trace of any territory as existing between Pergunnah Bijura and Pergunnah Taraf.

(iv) Fisher's report discloses two important facts. The hills immediately adjoining Bijura were at the time in the possession of the Rajah. Bishgaon had been purchased by the Rajah, and his influence in Bishgaon is described as even greater than his

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influence at Balisira. Now his influence at Balisira had consisted in this, that, having purchased certain Pergunnahs, he asserted that the hill land which was properly attached to the Pergunnahs, and in respect of which Jumka-Jumma had been paid by the proprietor of the settled Pergunnahs, was his as independent property.

(v) There are concurrent findings of fact by the two Courts that the lands in question were *de facto* in the possession of the plaintiff and his predecessors since the beginning of the 19th century. It is probable that, if asked, the Rajah would have sought to ascribe his possession to his independent territory, so long as the boundary was not conclusively settled against him. But that does not alter the fact of possession: and it is to be remembered that the testimony given by Fisher as to the practical occupation is given at the very moment that he decides that these lands do not form part of the Independent Raj. This testimony is reiterated by Reynolds. In the circumstances, and taking the concurrent findings of fact as to possession as the basis of their judgment, their Lordships have come to the conclusion that it is fair to ascribe this possession to the property which the Rajah undoubtedly had in Tuppa Bishgaon.

The only circumstance which, in their Lordship's opinion, led the Court of Appeal to prefer to rest their judgment on 60 years' possession and not upon the Pergunnah title, was the fact that in the revenue survey of 1859 the various mouzahs which undoubtedly form part of Pergunnah Bishgaon are not shown as extending as far as these lands: and that there is shown a tract of unoccupied territory, to which the name of the Raghunandan hills is given, extending from the boundary of the mouzahs to the ridge of hills which bounds Bijura. Their Lordships have always

given great weight to the accuracy of the survey maps. They are not conclusive, but in the absence of evidence to the contrary they will be presumed to be accurate. The present case, however, is somewhat peculiar. The Raghunandan hills were admittedly not surveyed : and their Lordships do not think that there was material before the surveyor in 1859 to settle the extent of possession held in connection with Tuppa Bishgaon in 1793-1840 and onwards.

The fact of possession as found by the two Courts in this particular case and for these particular plots, therefore, seems to their Lordships to overweigh what may be called the negative evidence of the map.

This disposes of the case as against the Secretary of State on the general question, there being a concurrent finding of fact as to possession within 12 years so as to exclude the plea on limitation. But there remains a special plea affecting plot 3. This plot was undoubtedly sold by the Government as waste land, and the sale was not in any way stopped or interfered with by the Rajah. In these circumstances the defendants rely on section 18 of the Waste Lands Act, (XXIII of 1863) which provides that no claim to any land or to compensation or damages in respect of any land sold or otherwise dealt with on account (of) Government as waste land shall be received after the expiration of three years from the date on which such land shall have been delivered by the Government to the purchaser or otherwise dealt with. The suit here is admittedly more than three years after delivery.

In order to deal with this plea, it is necessary to consider the scheme of the Act.

It provides that when waste lands are proposed to be sold by the Government, there must be a period mentioned in the advertisement as to the sale or disposition of the lands not less than three months

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within which any competing claim to the land in question must be intimated.

If such claim is intimated, the sale, pending investigation, is suspended. The Collector then inquires into the claim, and either allows or rejects it. If it is rejected the claimant must, within one week of the rejection, institute an appeal; failing which institution the rejection order is final. It is then provided that in any district the Local Government shall constitute a special Court for the adjudication of such claims; that notice of such constitution shall be given by proclamation, and that, after such proclamation, the jurisdiction of all Courts other than the special Court, as to claim to the land is abolished. Then after provisions as to the procedure of the special Court comes section 18 already partially quoted. Section 19 then provides that in any case in which land has been sold, if the Court is of opinion that the claim of the claimant has been established, the Court shall not award him possession of the lands, but shall order him to receive a sum of money from the Treasury in compensation.

The Subordinate Judge held that all this procedure only applied to lands held by the Government. The Court of Appeal hesitated to accept this view, and their Lordships think it is clearly wrong. For the very fact of providing special machinery to adjudicate on claims by other people to land which the Government are practically dealing with by means of sale, is destructive of the idea that the action is not applicable except in cases where in other Courts the Government could show it had a title.

The learned Appeal Court have treated the matter in the only way it was argued before them, viz., as a question of jurisdiction; and held that as the jurisdiction of the ordinary Courts was only ousted on

proclamation made of the constitution of the special Court, and as no technical proof had been given that any such Court was constituted, the ordinary Courts were not ousted.

Their Lordships agree that this is so, but it would scarcely be a satisfactory ground on which alone to decide the case, as the point not having been taken by the Subordinate Judge, their Lordships think that under sanction of costs the appellant might have been granted leave by the Court of Appeal to lead additional evidence to the effect that the Court had been constituted and proclamation made. There is, however, another good ground which, in their Lordships' view, is fatal to the appellant's contention. This Act is drastic in its character, and makes a great invasion on private rights. Those pleading it must therefore bring the matter strictly within its provisions. Now the whole of the provisions beginning with section 1, as to notices to be given to the Collector, advertisements, etc., clearly point to the necessity of proper intimation being given by the Government as to the proposed sale. The notice must be clear and not misleading, for otherwise how is the true owner if such exists to realise the necessity of coming forward? Now here the notice was quite misleading, for it advertised a sale of lands in Bijura, whereas the lands in question were certainly not in Bijura, whether they were in Bishgaon or Taraf.

Their Lordships think, therefore, that as against the plaintiff the whole proceedings fail for want of proper basis. The provision as to the three years in section 18 is clearly applicable, as the concluding words of the section show, to the proceedings before the special Court and that Court alone.

Their Lordships will, therefore, humbly advise His Majesty as against the defendant the Secretary of State,

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in Appeal No. 126 of 1911 to dismiss his appeal with costs.

It has been intimated to their Lordships that leases of the lands in the possession of the third and fourth respondents in Appeal No. 4 of 1912 have been entered into between the Maharajah and these parties. Their rights will now be governed by the leases and it is unnecessary for their Lordships to make any recommendation to His Majesty in connection with this appeal which will be dismissed without costs on either side.

Appeal and cross-appeal dismissed.

Solicitor for the Secretary of State for India in Council: *The Solicitor, India Office.*

Solicitors for Maharajah Birendra Kishore Manikya Bahadur: *T. L. Wilson & Co.*

Solicitors for the Tea Company respondents: *Sanderson, Adkin, Lee & Eddis.*

J. V. W.

APPELLATE CIVIL.

Before Woodroffe, D. Chatterjee and Newbould JJ.

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Evidence—Mortgage—Deed, form of proof of—Evidence Act (I of 1872), ss. 68 to 71.

In a suit on a mortgage bond, the admission of execution by the sole mortgagor does not dispense with the necessity of complying with the provisions of section 68 of the Evidence Act in order to prove the execution of the document as against other parties in the suit who do not admit such execution. Such a document must be proved as against them in accordance with the provisions of sections 68, 69 and 71 of the Evidence Act.

Jogendra Nath Mukhopadhyaya v. Nitai Churn Bowlopadhyaya (1) distinguished.

SECOND APPEAL by Satish Chandra Mitra, the plaintiff.

The appeal arose out of a mortgage suit. Defendant No. 1 was the mortgagor. The other defendants were subsequent purchasers. Defendant No. 1 admitted the mortgage, but pleaded satisfaction. The remaining defendants denied the *bona fides* of the mortgage and impeached it as fraudulent and collusive and executed without consideration. On the day of the trial, defendant No. 1 did not appear and the prayer of defendants Nos. 3 to 5 for time was rejected. Defendant No. 6 also failed to appear. The

* Appeal from Order, No. 56 of 1915, against the order of D. P. Bagchi, Subordinate Judge of Faridpur, dated Jan. 14, 1915, reversing the order of Man Mohan Neogi, Munsif of Faridpur, dated March 18, 1914.

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suit was eventually decreed *ex parte* against the non-appearing defendants and dismissed as against the appearing defendant. The decree made in the case was a mortgage-decree. The Munsif passed the decree upon the admission of the mortgagor defendant in his written statement and upon the oath of the Sub-Registrar and the person through whom the money was advanced. None of the attesting witnesses were called and examined to prove the execution of the mortgage, though the plaintiff had applied for time to do so.

On appeal by defendants Nos. 3 to 5, the Subordinate Judge held that the mortgage-deed should not have been used in evidence, as no attesting witness had been called, as provided for in section 68 of the Evidence Act, for the purpose of proving its execution. On this view the judgment and decree of the Court below were reversed and the appeal allowed.

The plaintiff appealed to the High Court. At the hearing of the appeal there was a difference of opinion between D. Chatterjee and Newbould JJ. and the case was referred to Woodroffe J. The differing judgments were as follows :—

D. CHATTERJEE J. This was a suit upon a mortgage bond. The defendant No. 1 was the executant of the mortgage and the other defendants derived title to the mortgaged property subsequently by execution and certificate sales. The defendant No. 1, executant of the document, admitted the mortgage-deed and the first Court gave a decree on the basis of the mortgage.

It appears that defendants Nos. 3 to 5 made an attempt to have the case postponed for the purpose of getting an order of transfer of the case to the Court of the Subordinate Judge for trial with another suit in the same matter. Before the order of the District Judge on the application for transfer was received the case was disposed of by the learned Munsif. Upon appeal, the learned Subordinate Judge remanded the case, holding that the document, that is the mortgage deed, had not been proved by the examination of any of the attesting witnesses as required by section 68 of the Evidence Act.

On appeal it is contended before us that the order of the learned Judge below is wrong, in that section 70 of the Evidence Act provides that the admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested, and that therefore it was not necessary to prove the attestation of the document.

It is contended by the learned vakeel for the respondents, however, that an admission of the execution by the executant has the effect of proving the document as against the party making the admission and not as against them; and as they stated in the written statement that the document was not executed in accordance with law, the document ought to have been proved, so far as they are concerned, in accordance with the general provisions of section 68.

Section 68 provides that if a document is required by law to be attested it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. Section 69 provides for cases where no attesting witness can be found. Section 70 says that if a person who has executed a document admits the execution, then that will be taken as sufficient proof of its execution as against him, *i.e.*, the person making the admission. Section 70 therefore seems to be an exception to the general rule contained in section 68. This exception must be read by the light of the words used in it, and so reading the section the meaning seems to be that an examination of an attesting witness will not be necessary for the purpose of proving the execution, if the executant admits that he has executed the document; but this proof must be considered as confined in its operation only to the person making the admission. If that be so, the defendants Nos 3, 4 and 5 who do not admit the execution of the document, cannot be said to be bound by the sufficiency of the proof of the execution supplied by the admission of the executant. This contention of the learned vakeel for the respondent seems to be supported by principle also. The defendant No. 1, I take it, executed the mortgage and thereafter he made sales in favour of the respondents, or the respondents derived title to his right, title and interest existing after the execution of the mortgage. If it were to be held that the respondents were bound by the admission made by the executant subsequent to their acquisition of title, it would be sinning against the law of admissions; because in that case the executant of the document would be making a derogation from his own grant by making an admission to the detriment of persons deriving title from or through him before the admission.

In this view of the case, I think that the lower Appellate Court was

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right in sending the case back for the formal proof of the document as against defendants Nos. 3, 4 and 5 who did not admit the execution of the document. I would, therefore, dismiss this appeal with costs.

As there has been a difference of opinion in this case, it will be placed before the Hon'ble the Chief Justice so that it may be referred to a third Judge. The point on which the Court has differed is whether in a suit on a mortgage bond the admission of execution by the sole mortgagor is sufficient to render it unnecessary for the mortgagee to comply with the provisions of section 68 of the Evidence Act in order to prove the execution of the document as against subsequent transferees of the mortgaged property who do not admit the execution, or must the execution be formally proved against them.

NEWBOULD J. In this case I regret that I am unable to agree with my learned brother. We are, I think, agreed that section 70 of the Evidence Act must be read by way of proviso to section 68. From this it appears to me to follow that an admission by the sole executant of an attested document of its execution by himself dispenses with the necessity to call an attesting witness under section 68 for the purpose of proving its execution. There is a marked difference in the language used in the two sections 68 and 70. Section 68 speaks of the document being "used as evidence," section 70 of its being "proved." Under section 70, and even apart from it, the admission of a party to an attested document cannot prove it against a person who is not a party to it. But I see no reason why such admission should not render the document admissible in evidence against him. The admission does not prove the document against him; but it is sufficient to prevent his taking the technical plea that the provisions of section 68 have not been complied with.

I am aware that a contrary view was expressed by a Divisional Bench of this Court in *Jogendra Nath Mukhopadhyaya v. Nitai Churn Banerjee* (1). But this is only an *obiter dictum* as the document there in question was held to have been proved to be only attested on other grounds. The correctness of the view taken by the learned Judges who decided this case has been doubted by Ameer Ali and Woodroffe's "Law on Evidence," 5th edition, page 506, where it is stated "if the admission of the executant has not the effect of dispensing with proof of attestation, there was no necessity for the section at all, as recourse may be had to the general provisions of the Act relating to admissions, if the admission of execution is to be used only in the sense of an admission of signing only."

It, therefore, seems to me that section 68 must be read subject to the provisions of subsequent sections; and where an executant admits execution

of an attested document, the document can be used as evidence against other parties to the suit and proved in the ordinary way without it being necessary to call or prove the handwriting of an attesting witness.

I would, therefore, decree the appeal and set aside the order of the learned Subordinate Judge, remanding the case for a fresh trial, and direct him to dispose of the appeal on the evidence on the record.

Babu Bipinbihari Ghose (Jn.) (with him *Babu Surendra Kumar Bose*), for the appellant. Section 68 of the Evidence Act deals with a particular method of proving documents that are required by law to be attested. The succeeding sections are provisos where the rule laid down in section 68 is modified. The words "as against him" in section 70 contemplates a case where there are more mortgagors than one. By the words "party to a document" are meant the mortgagee and mortgagor, and no others: *Abdul Karim v. Salimun* (1).

The puisne mortgagees or those who have got the equity of redemption are not prejudiced, as it is open to them to impeach the transaction in any way they like.

"Proof" does not mean *conclusive* proof.

Dr. Sarat Chandra Basak (with him *Babu Ashitranian Ghose*), for the respondents, was asked only about the proper form of the decree that should be passed in the case.

Cur. adv. vult.

WOODROFFE J. In the case of a document required by law to be attested the admission of a party to it of its execution by himself is, under section 70 of the Evidence Act, sufficient proof of its execution as against him. If, therefore, the question had arisen solely between the plaintiff and the mortgagor in this case, it would not have been necessary to have called

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any attesting witnesses or other evidence. The admission by the party to the document would have dispensed with the necessity of all further proof. In the present case, however, there are other defendants than the mortgagor. The learned pleader who appears on behalf of the plaintiff admits that the admission of the mortgagor is not evidence against his co-defendants, and that it will therefore be necessary for him to prove by evidence affecting those co-defendants that the mortgage was executed and operative. He, however, contends that the effect of the admission by the executant is to dispense him from proof in a particular form, namely, by calling an attesting witness. He contends that the effect of sections 68 to 72 of the Evidence Act is that where there are several defendants against whom a mortgage is sought to be proved and one of the defendants being the executant of the document admits execution, that admission whilst not dispensing with the necessity of proof of the mortgage as against the defendants other than the executant, does dispense with the necessity of calling an attesting witness. I am, however, unable to agree with this contention. The effect of section 70 is, in my opinion, that the proof by calling attesting witnesses is dispensed with where the party executant admits execution only as against him, and that where there are other defendants than the party making such admission the document is not admissible in evidence as against them until it has been proved by attesting witnesses in the manner prescribed by the Act. It is the common practice that a document is admitted against a particular party only or for a particular purpose and not as against other parties or for other purposes. In the case before me it is, in my opinion, necessary not only to prove the document as against the defendants other

than the admitting executant, but to prove it in the way required by sections 68 and 69, namely, the production of an attesting witness. The admission of the executing party has no effect at all, except as regards the party himself. As regards others, the position is just the same as if there had been no such admission; that is, the case must be proved against them in the way required by those sections. The decision in the case of *Jogendra Nath Mukhopadhyaya v. Nitai Churn Bundopadhyaya* (1) does not touch the matter before us, for there the question was not as to the effect of an admission by an executant upon the question of the proof required against parties other than the executant: nor does the passage cited from the text-book quoted in Mr. Justice Newbould's judgment refer to the matter now in issue, but to the point which appears to have been raised by the decision in *Jogendra Nath's Case* (1). That decision is open to this construction that even when the executant admits execution, his admission is proof of execution or signing only and does not dispense with proof of attestation. If this be the meaning of that judgment, I am unable to agree with it, as I think that the admission of the executant has the effect of dispensing with the proof of attestation as against him. For if the admission of execution is to be understood only in the sense of an admission of signing, then there was no necessity for section 70 at all, regard being had to the general provisions of the Evidence Act relating to admissions. This is also indicated by the last words of section 70, "though it be a document required by law to be attested." I therefore agree with the conclusion of Mr. Justice Chatterjee that in a suit on a mortgage bond the admission of execution by the sole mortgagor does not

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dispense with the necessity of complying with the provisions of section 68 of the Evidence Act in order to prove the execution of the document as against other parties in the suit who do not admit such execution. I think that a document must be proved as against them in accordance with the provisions of sections 68, 69 and 71 of the Evidence Act.

I therefore dismiss this appeal with costs.

S. M.

Appeal dismissed.

APPELLATE CIVIL.

Before Sanderson C.J. and Mukerjee J.

MIDNAPUR ZEMINDARY COMPANY, LD.

v.

SECRETARY OF STATE FOR INDIA.*

1916

June 8.

Court-fee—Suit for declaration that entry in record of rights a nullity, whether one for consequential relief—Specific Relief Act (I of 1877) Ch. VI, s. 42—Bengal Tenancy Act (VIII of 1885) s. 111A—Amendment or rejection of plaint—Civil Procedure Code (Act V of 1908) O. VII, r. 11.—Court Fees Act (VII of 1870) Sch. II, Art. 17, cl. (iii), s. 7, (iv) cl. (c).

Where a court-fee of rupees ten was paid in a suit purporting to be under section 111A of the Bengal Tenancy Act, but the plaintiffs prayed for a declaration (a) that they were occupancy ryots, and (b) also that the entry in the record-of-rights showing them as tenure-holders was a nullity ; and the plaintiffs on being required to supply the deficit court-fee on the second relief claimed failed to do so within the time fixed by the Court :—

Held, (i) that the second prayer being for a consequential relief was not such a declaration as was contemplated by the proviso to section 111A ; (ii) that the learned Judge had no alternative but to reject the plaint ; and (iii) that the plaintiffs could not be allowed to amend the plaint by striking

* Appeal from Original Decree, No. 91 of 1915, against the decree of Chandra Bhusan Banerjee, Subordinate Judge of Murshidabad, dated Feb. 3. 1915.

out the second prayer for relief as the provision of O. VII r. 11 of the Civil Procedure Code was mandatory.

APPEAL by the Midnapore Zemindary Co., Ltd., the plaintiffs.

On the 9th January 1915 the Midnapore Zemindary Co., Ltd., brought a suit in the Court of the Subordinate Judge of Murshidabad for a declaration (a) that they were occupancy ryots and not tenure-holders, and (b) that the entry in the record-of-rights as to their status as tenure-holders was a nullity. The plaint was written on a rupees ten stamp paper. By his order dated 25th January 1915 the Subordinate Judge held that the suit was not only for a declaration of right, but there was also a prayer for consequential relief and therefore directed the plaintiffs to pay *ad valorem* court-fees within 7 days. The plaintiffs having failed to do so, the plaint was rejected on the 3rd February 1915. The plaintiff company thereupon preferred an appeal to the High Court.

Mr. U. N. Sen Gupta (with him *Babu Jogesh Chandra Roy, Babu Sitaram Banerjee* and *Babu Probodh Kumar Das*, for the appellants. I submit that it is a declaratory suit pure and simple, and that no consequential relief has been asked for in the plaint.

[MOOKERJEE J. What about prayer (b) that the entry in the record-of-rights is a nullity?]

It is nothing beyond a declaration that is prayed for. It does not ask for the correction of the entry or any consequential relief of that nature. I submit that a suit with such a prayer would be nothing but a declaratory suit. I rely on the decision in *Ramgulam Singh v. Bishnu Pargash Narain Singh* (1), where it has been held that a plaintiff can bring a

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suit within six years for a declaration that the entry in the record-of-rights contains erroneous statements. The prayer in this case has only been differently worded but it means exactly the same thing.

[MOOKERJEE J. You are entitled to bring a suit only for a declaration of your title and for nothing else. Prayer (b) is one for consequential relief.]

This declaration is a part of the declaration of my title. When a reversioner brings a suit that certain documents executed by the widow or holder of a life interest are not binding against him, it is nothing but a declaration of his title within the meaning of section 42 of the Specific Relief Act.

[SANDERSON C. J. Look at section 42. It speaks only of a declaration of title.]

A document may create or affect a person's title to any property. Similarly, an entry in the record-of-rights affects the plaintiff's title. The plaintiffs are in possession of the property. I do not want to have the entry set aside or corrected. Under section 111A I cannot ask for that. I want only a declaration that it is a nullity. I submit that it comes within the rule of law laid down in *Ramgulam Singh v. Bishnu Pargash Narain Singh* (1).

[MOOKERJEE J. Prayer (a) is for declaration of your title, while prayer (b) is for consequential relief.]

I pray for permission to have that prayer struck off and for restoration of the suit.

The Senior Government Pleader (Babu Ram Charan Mitra), for the respondent. This is a suit with a prayer for consequential relief: see *Joy Narain Giree v. Girish Chandra Mytee* (2). What would be the effect of such a declaration.

[MOOKERJEE J. Look at the decision in *Zinnat-*

(1) (1906) 11 C. W. N. 48.

(2) (1874) 22 W. R. 433.

unnessa Khatun v. Girindra Nath Mukerjee (1).

We have nothing to do with the ultimate effect.]

I submit the effect would be that under section 107 of the Bengal Tenancy Act the plaintiff company would be able to have the record corrected. But under Order VII, rule 11 the Court had no other alternative but to reject the plaint under the circumstances of the case.

Mr. U. N. Sen Gupta, in reply.

SANDERSON C. J. I think this appeal must be dismissed.

The point arises upon the plaint which was filed in this case. The learned Judge has held that the plaint was not one that merely asked for a declaratory decree, but was one in which a consequential relief was claimed. The stamp which was upon the plaint was one of Rupees ten the stamp which is applicable to a plaint in a suit to obtain a declaratory decree, under Article 17, clause (iii) of the second Schedule to the Court Fees Act of 1870. The learned Judge held that it was a plaint in which a consequential relief was asked, and consequently it came within section 7, sub-section iv, clause (c) of that Act.

In my judgment there is no doubt that the learned Judge was right. The suit was instituted under section 111A of the Bengal Tenancy Act; and in considering the nature of the suit regard must be had to the actual words of the section. It provides that "No suit shall be brought in any Civil Court in respect of any order directing the preparation of a record-of-rights under this chapter", with certain saving clauses—"Provided that any person who is dissatisfied with any entry in, or omission from, a record-of-rights framed in pursuance of an order

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made under section 101, sub-section (2) clause (d), which concerns a right of which he is in possession, may institute a suit for declaration of his right under Chapter VI of the Specific Relief Act, 1877. In my judgment these words must be strictly applied. What is it he is entitled to ask for in a suit brought under that section? He is entitled to ask for a declaration of the right of which he claims he is in possession. In this case the plaintiff claims that he is in possession of an occupancy right. Therefore, he is quite entitled to ask for such a declaration as is comprised in paragraph (a) of paragraph 11 of his plaint. But he goes on in paragraph (b) to ask for a declaration that "the entry in the records as to his status as tenure-holder is a nullity. In my judgment that is not such a declaration as is contemplated by the proviso to section 111A. I think the words are so plain that the point which has been taken on behalf of the plaintiff is not really arguable. Therefore, I think the order of the learned Judge was right. Having come to the conclusion, as he did, that the plaintiff was asking for something more than a mere declaratory decree, and was asking for a consequential relief, what was the learned Judge to do? That is pointed out clearly by Order VII, rule 11 which says this.—"The plaint shall be rejected in the following cases:—(a) where it does not disclose a cause of action" that is not the case here: (b) "where the relief claimed is under-valued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so": again that is not this case—"(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so". In this case the relief was properly valued

at Rs. 5,225 at least there was nothing said to show that the relief was not properly valued. But the learned Judge rightly came to the conclusion that the plaint was written upon paper insufficiently stamped and the plaintiff on being required by the Court to supply the requisite stamp paper within the time fixed by the Court, failed to do so. Therefore he had no other alternative but to reject the plaint in accordance with the terms of the rule. In my judgment, the learned Judge was right in his decision,—he had no alternative but to reject the plaint.

The learned counsel, who appeared on behalf of the plaintiff, asked this Court to give the plaintiff leave to amend his plaint by striking out paragraph (b) of clause 11 in his plaint. In my judgment, he ought not to be allowed to do so for the reasons I have already given and this Court has no more power than the learned Judge when it is shown that the case comes within Order VII, rule 11. This Court has no jurisdiction, the provision is mandatory, and this Court, just the same as the Court below, is bound by that section which provides that under the above-mentioned circumstances the suit shall be rejected.

The appeal is dismissed with costs.

MOOKERJEE J. I agree.

G. S.

Appeal dismissed.

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CRIMINAL REFERENCE.

Before Mookerjee and Sheepshanks JJ.

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June 14.

KARALI PRASAD GURU

v.

EMPEROR.*

Lurking House-trespass—Theft—Penal Code (Act XLV of 1860) ss. 456 457, 380—Trial for house-trespass and theft under ss. 457, 380, Penal, Code—Disbelief of story of theft—Finding of intention to make immoral proposals—Conviction under s. 456, legality of—Prejudice—Criminal Procedure Code (Act V of 1898) s. 238—Necessity of charging intention in cases under s. 456.—Intention how determined—Rule of construction of decided cases.

On a trial for offences under ss. 457 and 380 of the Penal Code, although the alleged intention, viz., to commit theft has failed, the Court can, under s. 238 of the Criminal Procedure Code, convict the accused of a minor offence, under s. 456 of the Penal Code, if he has not been prejudiced thereby.

Where on an allegation that the accused entered the room of a widow at night and committed theft, he was tried summarily for offences under ss. 457 and 380, and set up the defence of previous intrigue and entry with such intent at her invitation, but the Court disbelieved the stories of theft and intrigue and found the entry to have been without her consent and in order to make immoral proposals to her to her annoyance :

Held, that the conviction under s. 456 of the Penal Code was legal, and that the accused had not been prejudiced in the circumstances.

Jharu Sheikh v. King-Emperor (1) distinguished.

Koilash Chandra Chakrabarty v. Queen-Empress (2), *Balmakand Ram v. Ghansamram* (3), *Premamundo Shaha v. Brindabun Chung* (4), *Emperor v. Ishri* (5), *Sher Singh v. Empress* (6), *Lajji Ram v. Queen-*

* Criminal Reference No. 90 of 1916, by C. Tindall, Sessions Judge of Bankura, dated June 6th, 1916.

(1) (1912) 16 C. W. N. 696.

(4) (1895) I. L. R. 22 Calc. 994.

(2) (1889) I. L. R. 16 Calc. 657.

(5) (1906) I. L. R. 29 All. 46.

(3) (1894) I. L. R. 22 Calc. 391.

(6) (1883) Punj Rec. 14.

Empress (1), *Ramrang v. King-Emperor* (2), *Queen-Empress v. Balu* (3) approved.

In determining the question of prejudice, the nature of the case made at the trial, the evidence given and the line of defence of the accused are matters to be taken into consideration.

Reg. v. Govindas Haridas (4) referred to.

To sustain a conviction under s. 455 of the Penal Code, it is not necessary to specify the criminal intention in the charge. It is sufficient if a guilty intention contemplated by s. 441 is proved.

The intention may be determined from direct evidence or from the conduct of the accused and the attendant circumstances of the case.

Balmakand Ram v. Ghansamram (5), *Rex v. Dixon* (6) referred to.

Every judgment must be read as applicable to the particular facts proved or assumed to be proved.

Quinn v. Leatham (7) followed.

One Golap Goalini, a young Hindu widow, lodged an information at the thana, on the 26th April 1916. that the accused had entered her room at midnight while she lay asleep in the same bed with her mother, and had removed an ear-ring from her person, when she seized him and raised a cry, that her mother also awoke and caught him, but he escaped naked leaving his *dhoti* behind. The police thereupon arrested him and sent him up before the Deputy Magistrate of Bankura. He was tried summarily for offences under ss. 457 and 380 of the Penal Code, and put forward the defence, supported by some witnesses, that he has been for some time in intrigue with the young woman and had entered her room at her invitation for such purpose. He denied the theft and the ownership of the *dhoti*, and stated that he had left the place stealthily on discovering the mother to be awake.

The Magistrate disbelieved the stories of the theft and previous intrigue, but found that the accused

(1) (1898) *Punj. Rec.* 12.

(4) (1869) 6 *Bom. H. C.* 96.

(2) (1902) *Punj. Rec.* 18.

(5) (1894) 1 *L. R.* 22 *Calc.* 391.

(3) (1886) *Ratan Unrep. Cr. C.* 293. (6) (1814) 3 *M. & S.* 11, 15.

(7) [1901] *A. C.* 495, 506.

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had entered the room without the woman's consent and in order to make immoral proposals to her to her annoyance, and convicted him under s. 456 of the Penal Code, sentencing him to six weeks' rigorous imprisonment.

The Sessions Judge, while agreeing in the view of the facts taken by the Magistrate, referred the case under s. 438 of the Criminal Procedure Code, on the authority of the ruling in *Jharu Sheik v. King-Emperor* (1), recommending a re-trial under s. 456 of the Penal Code.

No one appeared on the reference.

MOOKERJEE AND SHEEPSHANKS JJ. This is a reference under section 438 of the Criminal Procedure Code by the Sessions Judge of Bankura.

The facts material for the determination of the questions raised on this reference may be briefly stated. On the morning of the 29th April 1916, one Golap Goalini lodged an information in the police station at Mejhia that at midnight Karali Prasad Guru had entered her house while she and her mother were asleep on the same bed and that the entry was made with intent to commit a theft of her ornaments. She woke up as soon as her body was touched, and noticed the accused who took her ear-ring from her right ear. She caught his clothes and raised a cry. Her mother awoke, lighted a match and caught the man. He pushed her down, tried to free himself from the hold of the complainant but failed, and ran away naked, leaving his wearing cloth behind. On this information, the police took action, arrested the accused, and sent him up for trial. He was then summarily tried for offences under sections 457 and 380 of the Indian Penal Code, that is, lurking house-trespass by night

(1) (1912) 16 C. W. N. 696.

and theft from a dwelling house. He pleaded not guilty and filed a written statement. The substance of his defence was that he had for a long time carried on an intrigue with the complainant and had on the night of the incident entered the house at her invitation; he denied the theft of the ear-ring and asserted that the cloth produced in Court had never been worn by him. His story was in effect that as soon as he discovered that the mother of the complainant was awake, he stealthily withdrew from the place in fear. Evidence was adduced on behalf of the prosecution, not only to prove the incident as alleged by the complainant, but also to show that she was a respectable woman and had led a blameless life since the death of her husband 6 or 7 years ago. The accused, on the other hand, brought forward witnesses to depose that he had for some time past carried on an intrigue with the complainant. The Deputy Magistrate came to the conclusion that the incident had happened as narrated by the complainant and her witnesses. He also held that the story of an intrigue between the complainant and the accused, as told by the defence witnesses, was untrue and that the accused had entered that night into the house of the complainant, not to commit theft as she alleged nor to carry on an intrigue at her invitation, as he asserted, but really with a view to make immoral proposals to her and thus to annoy her. In this view the Deputy Magistrate convicted the accused under section 456 of the Indian Penal Code and sentenced him to six weeks' rigorous imprisonment. The accused thereupon moved the Sessions Judge on the ground that the conviction under section 456 was illegal, on the authority of the decision of this Court in *Jharu Sheikh v. King-Emperor* (1). The Sessions Judge has accepted this

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contention and has recommended that the conviction may be set aside and the accused re-tried. We have carefully examined the record and arrived at the conclusion that the conviction should be sustained.

The decision in *Jharu Sheikh v. King-Emperor* (1), by reason whereof the Sessions Judge felt constrained to make this reference, is, we think, distinguishable. There the accused was charged with offences under sections 457 and 380. As regards the charge under section 457, the intent imputed to him was the commission of theft. The defence was a complete denial of the incident, and the prosecution was said to be due to malice and ill-feeling. In these circumstances, this Court held that no conviction could properly be made under section 456 till the charge under section 457 had been amended. The reason assigned for this opinion was that the accused must have been seriously prejudiced by not knowing what really was the charge against him. It is not necessary for us to express an opinion upon the question whether this view was correct, even in the circumstances of that case. But it is plain that if the Court intended to formulate an inflexible rule of universal application that under no circumstances can a conviction be made under section 456 when the accused has been charged with the commission of an offence under section 457, the view cannot possibly be sustained. Section 238 of the Criminal Procedure Code, which provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it, would clearly be applicable to a case of this character. This view was adopted by West and Nanabhai, JJ. in *Queen-Empress v. Balu* (2). There the accused had

(1) (1912) 16 C. W. N. 696.

(2) (1886) Ratn Unrep. Cr. C. 293.

been convicted by the trial Court under section 457; on appeal the conviction was altered to one under section 414. The High Court held that section 457 applied to what might be called a composite offence, and, consequently, under section 238 of the Criminal Procedure Code, an accused might be convicted of any element of the composite offence which constituted a minor offence. A similar course was followed in *Emperor v. Ishri* (1). There the accused was charged under section 457, but convicted under section 456, as the intent imputed to him was not established; the conviction was sustained by the High Court: see also *Sher Singh v. Empress* (2). We are of opinion that the decision in *Jharu Sheikh v. King-Emperor* (3) must be limited to its special circumstances, and, in this connection, the warning given by Lord Halsbury L. C. in *Quinn v. Leathem* (4), may be usefully borne in mind, namely, "that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found." We cannot, consequently, hold that merely because the intent imputed to the accused to sustain a conviction under section 457 has failed, no conviction can be made under section 456. We are not now concerned with the question whether a conviction under section 457 can be sustained when the specific intent imputed to the accused is not established, but another intent is proved. We are accordingly not called upon to consider the applicability of the class of cases in which it has been ruled that a conviction under

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(3) (1912) 16 C. W. N. 696.

(2) (1883) Punj. Rec. 14.

(4) [1901] A. C. 495, 509.

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section 147 cannot be supported unless the common object of the assembly as established by the evidence agrees in essential particulars with that laid in the charge: *Silajit Mahto v. Emperor* (1), *Poresb Nath Sircar v. Emperor* (2), *Rahimuddi v. Asgar Ali* (3). In that class of cases, the weighty observations in *Behari Mahton v. Queen-Empress* (4) may be borne in mind; "an accused person is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he has this knowledge, he must be seriously prejudiced in his defence. This is true in all cases, but it is more specially true in cases where (as in a case under section 147) it is sought to implicate him for acts not committed by himself but by others with whom he was in company." We hold, consequently, that although the specific intent, namely, the intent to commit theft, was not established, yet it was competent to the Court to convict the accused under section 456, and the only consideration is, whether the accused has been prejudiced at the trial by the conviction for a minor offence, in conformity with section 238 of the Criminal Procedure Code. In the determination of this question, as pointed out by Couch, C. J. in *Reg. v. Gorindas Haridas* (5), the nature of the case made at the trial against the prisoner, the evidence that was given and the line of defence set up by him, are all matters to be taken into consideration.

Now it is well settled that to sustain a conviction under section 456 it is not necessary to specify the criminal intention in the charge; it is sufficient if a guilty intention is proved, such as is contemplated by section 441: *Koilash Chandra Chakrabarty v. Queen-*

(1) (1909) I. L. R. 36 Calc. 865 (3) (1903) I. L. R. 27 Calc. 990.

(2) (1905) I. L. R. 33 Calc. 295. (4) (1884) I. L. R. 11 Calc. 106.

(5) (1889) 6 Bom. H. C. R. 76.

Empress (1), *Balmakand Ram v. Ghansamram* (2),
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v. Queen-Empress (6), *Ramrang v. King-Emperor* (7).

In the case before us, the accused admitted his presence at midnight in the house of the complainant. He alleged that he went there by invitation of the complainant with whom he had an intrigue. Evidence was directed at the trial to this point by both the prosecution and the accused, and the question in controversy has been decided. The trial Court has disbelieved the defence witnesses and accepted the prosecution testimony. The Sessions Judge has examined the evidence and has confirmed the view of the Deputy Magistrate. We see no reason to differ from these conclusions. The position then is that the accused is found at midnight in the house of the complainant, a respectable widow, while she is asleep on the same bed with her mother. He is caught, struggles to get off, and ultimately runs away leaving his wearing cloth behind. The explanation he offers for his presence in the house at dead of night and for this singular incident has been rejected. What, then, could have been his intention? The answer is best given in the words of Hill J. in *Koilash Chandra Chakrabarty v. Queen-Empress* (1). "What we have then to deal with is the case of a man, a stranger, who, uninvited and without any right whatever to be there, effects an entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and who, when an attempt is made to capture him, uses great violence

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(1) (1889) I. L. R. 16 Calc. 657.

(2) (1894) I. L. R. 22 Calc. 391.

(3) (1895) I. L. R. 22 Calc. 994.

(4) (1906) I. L. R. 29 All. 46.

(5) (1883) Punj. Rec. 14.

(6) (1898) Punj. Rec. 12.

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in the effort to make good his escape. Under such circumstances, we think the Court ought to presume that the entry was effected with an intent such as is provided for by section 411 of the Indian Penal Code." In the language of Pigot, J. in *Premanundo Shaha v. Brindabun Chung* (1), "the position of the accused and all the facts preclude any notion of his going there to steal or for any purpose save his own pleasure; the facts are good evidence of an intent and of an intrusion on privacy within the meaning of section 509 of the Indian Penal Code, and, therefore, the intent to commit an offence within the meaning of section 441 is made out." To the same effect are the observations of Banerjee, J. in *Balmakand Ram v. Ghansamram* (2), and of Turner, C.J. in *Re Samban* (3). As was pointed out by Banerjee, J., the intention may be determined as well from direct evidence as from the conduct of the party concerned and the attendant circumstances, for, as Lord Ellenborough; C.J. said in *Rex v. Dixon* (4), "it is an universal principle that when a man is charged with doing an act, the intention is an inference of law resulting from the doing the act." We are further clearly of opinion that the accused has been in no way prejudiced and will gain nothing by a retrial. If a retrial is directed, if he is charged under section 456, if it is alleged that the trespass was committed with intent to commit an offence under section 509, if he urges in defence that he entered into the premises at the invitation of the complainant with whom he was on terms of intimacy, what will be the question for investigation?—the very question which has now been determined on evidence adduced on behalf of the complainant and the accused. We feel no doubt

(1) (1895) I. L. R. 22 Cal. 994, 998. (3) (1881) 1 Weir 533.

(2) (1894) I. L. R. 22 Cal. 391.

(4) (1814) 3 M. & S. 11, 15.

whatever that, in these circumstances, it would not be right to direct a retrial and afford a possible opportunity for the manufacture of perjured evidence. As regards the sentence, we are of opinion that it does not err, by any means, in the direction of severity. The offence committed was very serious. The complainant is a respectable woman, and though she occupies a humble station in life, she is entitled to the full protection of the law. The accused, on the other hand, is said to be well-connected and is a person of means and some position, but that is a good reason why he should not be treated with misplaced leniency. Unless exemplary sentences are passed in these cases, persons who are inclined to run the risk of detection in the commission of such offences are not likely to be deterred. We accordingly decline to interfere in the exercise of our revisional jurisdiction, and direct that the accused be called upon to surrender, so that he may serve out the remainder of the term of imprisonment.

E. H. M.

APPELLATE CIVIL.

Before Sanderson C.J. and Newbould J.

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March 17.

Jurisdiction—Leave to withdraw suit by the Appellate Court—Subsequent Suit—Res Judicata—Civil Procedure Codes (Act XIV of 1882), s. 373 (Act V of 1908), O. XXXIII, r. 1.

The plaintiff brought a suit for the declaration of his title in respect of certain rights and for other reliefs. This suit was dismissed by the Court

* Appeal from Appellate Decree, No. 1354 of 1913, against the decree of Ashutosh Banerjee, Subordinate Judge of Burdwan, dated Sep. 12, 1912, confirming the decree of Benode Behari Mukerjee, Munsif of Kalna, dated Jan. 16, 1912.

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of first instance on the merits after the evidence had been gone into. The plaintiff, thereupon, preferred an appeal. At the hearing of the appeal he made an application for leave to withdraw from the suit under section 373 of the Code of Civil Procedure, 1882, on the grounds of a formal defect and of his inability to produce the necessary evidence in time, and obtained an order in the presence of the defendants to the effect that the appeal be dismissed with costs and the plaintiff's suit be allowed to be withdrawn with leave for fresh action for the same subject-matter, if not barred. Subsequently, the plaintiff brought a fresh suit against the same parties on the same cause of action as in the previous suit.

Held, that the ground on which the order was made by the Appellate Court was not a ground which was contemplated by section 373 of the Civil Procedure Code and that, therefore, the order was without jurisdiction.

Khorda Co., Ltd. v. Durga Charan Chandra (1) and *Mabulla Sardar v. Rani Hemangini Debi* (2) referred to.

SECOND APPEAL by Kali Prasanna Sil, the plaintiff.

In 1905, Kali Prasanna Sil brought a suit against Panchanan Nandi Chowdhury and others for the declaration of his rent-free title in respect of a two-third share in certain fishery rights, for *khas* possession of the same and for *wasilat*. At the trial, this suit was contested on the merits and the Court of first instance dismissed it after hearing the evidence. The plaintiff then preferred an appeal and on the 18th May, 1906; at the hearing of the appeal, he applied under section 373 of the Code of Civil Procedure, 1882, for leave to withdraw from the suit, on the grounds that the suit must fail by reason of a formal defect and that he was unable to produce the necessary evidence in time at the trial before the Court of first instance. The Appellate Court in the presence of the defendants made the following order:—"The appeal is dismissed with costs and the plaintiff's suit allowed to be withdrawn with leave for fresh action for the same subject-matter, if not barred." On the 19th April, 1910, Kali Prasanna Sil brought the present suit

(1) (1909) 11 C. L. J. 45.

(2) (1910) 11 C. L. J. 512.

against the same parties in respect of the same property and asked for the same relief as he had asked for in his previous suit. It was contended by the defendants that the order of the Appellate Court under section 373 of the Code of Civil Procedure was without jurisdiction and that, consequently, the second suit was *res judicata* by reason of the decision which was given by the Court of first instance in the previous suit. Both the Courts below dismissed the suit. The plaintiff, thereupon, appealed to the High Court.

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Babu Mahendra Nath Roy (with him *Babu Jadu Nath Mandal* and *Babu Manmatha Nath Roy*), for the appellant. The sole question in this case was whether or not the order of the Judge in the Court of Appeal, dated the 18th May, 1906, was made without jurisdiction. It could not be urged that a formal defect had been proved before the Appellate Court, entitling the plaintiff to the benefit of section 373 of the Civil Procedure Code, 1882. The only ground upon which the plaintiff now relied in support of the order was his inability to produce the necessary evidence in time at the trial before the Court of first instance. It was settled law that the power given under section 373, which corresponded with O. XXIII, r. 1 of the new Code, could be exercised by an original as well as by an Appellate Court. This order was made in the presence of both parties. It might have been appealed against or corrected in revision, if the defendants thought that it was not a proper order and had been wrongly made. But as no steps had been taken to set it aside, this order must be held to have been accepted by the parties and to have become final and binding upon them: *Rajib Sarkhel v. Rajah Nil Monee Singh Deo* (1), *Chhajjua v. Khyali Ram* (2).

(1) (1873) 20 W. R. 440.

(2) (1912) 9 ALL. L. J. 378.

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There was nothing in section 373 of the Code, which deprived the Court of its jurisdiction in any case where there was sufficient reason to permit the plaintiff to withdraw from his suit. The power conferred by this section should be properly exercised by the Court and not upon frivolous grounds. The case of *Watson v. The Collector of Rajshahye* (1) had no bearing on this case. The Court of Appeal, therefore, had jurisdiction to make the order of the 18th May 1906.

Babu Baranasibasi Mukherjee and *Babu Biraj Mohan Majumdar*, for the respondents, were not called upon.

SANDERSON C. J. This is an appeal from the judgment of the learned Subordinate Judge of Burdwan given on the 12th of September 1913, in which he dismissed the suit of the plaintiff on the ground that the matter was *res judicata*. It appears that the plaintiff brought a suit in the year 1905 in respect of the same property which was the subject-matter of this suit asking for the same relief which he asked for in the present suit. That suit was contested, evidence being called on both sides, and the Court of first instance which heard that evidence dismissed the plaintiff's suit. Then on appeal to the lower Appellate Court and at some stage of that hearing, he applied under section 373 of the old Civil Procedure Code for leave to withdraw from the suit alleging, first of all, a formal defect, and, secondly, his inability to produce the necessary evidence in time. It was admitted by the learned vakil who argued this case for the appellant that, as far as he knew, there was no formal defect proved before the Appellate Court, and that the only ground which could be relied upon by the petitioner

(1) (1869) 13 Moo. I. A. 160.

in that case was the second one, namely, that he had not been able to produce the necessary evidence in time at the trial before the Court of first instance. Thereupon, the Appellate Court made an order to this effect: "The appeal is dismissed with costs and the plaintiff's suit allowed to be withdrawn with leave for fresh action for the same subject-matter, if not barred." Thereupon, this suit was brought, and the point was taken by the defendant that the order of the Appellate Court of the 18th of May 1906 had been made without jurisdiction and that, consequently, the subject-matter of the present suit was *res judicata* by reason of the decision which was given by the Court of first instance in the previous suit in 1905. The learned Subordinate Judge has upheld that view, and has consequently dismissed the plaintiff's suit, and this appeal has been lodged against the judgment of the Subordinate Judge. In my judgment, the Subordinate Judge was right.

The whole question depends upon whether the order of the 18th May 1906 was made without jurisdiction. If it was within the learned Judge's jurisdiction to make it, but it was a wrong order, then I can quite understand that the learned vakil for the appellant had something to say, inasmuch as the order had been allowed to stand, and the defendant against whom the order was made had taken no steps to attack that order. But if it was made without jurisdiction and it is brought to our notice now that it was made without jurisdiction and if we are satisfied that it was made without jurisdiction, then we are bound to say so and also to say that as a matter of consequence all proceedings taken in consequence of that order failed on that ground. Therefore, the only question is whether the order was made without jurisdiction. I think it was. I need not read the section in full. The section says, " . . . If the Court is

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satisfied on the application of the plaintiff (a) that the suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit. . . .” Now the words, as they stand in the section, are of course of general application, namely, “that there are sufficient grounds for permitting him to withdraw from the suit:” but there are decisions of this Court which, in my opinion, are binding upon us. It is quite true they are not upon the same section, but they are upon Order XXIII, rule 1 of the Civil Procedure Code which is now in operation, but the learned vakil, who argued the case for the appellant, admitted that there is no substantial difference between this Rule and section 373 of the old Code. In the first case, *Kharda Co., Ltd. v. Durga Charan Chandra* (1), it was held by my learned brother Mr. Justice Mookerjee that clauses (a) and (b) of sub-rule (2) have to be read together and that the intention is that a ground included in clause (b) must be of the same nature as the ground specified in clause (a), that is to say, it must be something of the same nature as *formal defect*, and, inasmuch as in that case the ground for allowing the suit to be started afresh was not because there was a formal defect but for some other reason, the order was illegal. Then again the learned Chief Justice Sir Lawrence Jenkins in *Mabulla Sardar v. Rani Hemangini Debi* (2), says: “The decision in *Kharda Co., Ltd. v. Durga Charan Chandra* (1) shows that clause (b) of sub-rule (2) must be read in connection with clause (a) and with the limitations clause (a)

(1) (1909) 11 C. L. J. 45.

(2) (1910) 11 C. L. J. 512.

suggests, and so reading it, it is clear that it is not within the jurisdiction of a Court of Appeal to grant the permission on the terms which have been approved by the Court in this case. In my opinion, this rule should be made absolute." Therefore, in the present case, inasmuch as the only ground that can be suggested for the order of the 18th of May 1906 was that the plaintiff had not been able to adduce all the evidence which he would have liked to adduce at the first hearing, I am of opinion that that was not a ground which is contemplated by section 373 of the old Civil Procedure Code; and, therefore, the order which was made by the Appellate Court was made without jurisdiction. Consequently, that order having been made without jurisdiction a fresh suit should never have been brought, and the defendant was perfectly competent and was within his rights when he raised the point that the matter was *res judicata*. I am of opinion that the lower Appellate Court was right in coming to the conclusion that it did, and this appeal must be dismissed with costs.

NEWBOULD J. I agree.

O. M.

Appeal dismissed.

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INSOLVENCY JURISDICTION.

Before Greaves J.

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July 20.

Re HARIPADA RAKSHIT.*Ex parte* BINODINI DASSEE.*

Insolvency—Presidency Towns Insolvency Act (III of 1909), ss. 33 to 37, 43
—Examination of persons under s. 36—Application for examination,
what should contain—Order, if may be made after insolvent's discharge
—Prospect of litigation with Official Assignee, no ground for refusing
order.

An application for examination of a person under s. 36 of the Presidency Towns Insolvency Act should state shortly the nature of the information likely to be given by the person sought to be examined and the dealings or properties of the insolvent to which such information will relate. The Court can, in a proper case, even after the discharge of the insolvent, make an order for the examination of a person under s. 36.

There is nothing in the Insolvency Act to limit the powers of the Court under that section to the period before the insolvent's discharge, though, having regard to s. 43, it may be that the provisions of s. 36 will not be applicable to the insolvent himself after his discharge.

An order for examination under s. 36 should not be refused merely because litigation may ultimately ensue between the Official Assignee and the person sought to be examined.

THIS was an application by Sreemutty Binodini Dassee, the wife of the insolvent, to set aside an order made by the Registrar in Insolvency for her examination under section 36 of the Presidency Towns Insolvency Act. The order of adjudication was made on the 29th November 1910 and the insolvent obtained his discharge on the 2nd June 1915. In his schedule of affairs filed on the 6th February 1911, the insolvent had stated that he was entitled to a third share in some immoveable properties mentioned

* Application in Insolvency Suit No. 178 of 1910.

therein. On the 14th December 1912, a suit was filed in the Alipore Court by a co-sharer of the insolvent in these properties against the insolvent and others for a partition of the properties. In his written statement the insolvent stated that the properties belonged to his wife, Binodini Dassee. Subsequently by an order made in that suit the name of the insolvent was struck out and the Official Assignee was added as a defendant. By the final decree in that suit, certain portions of the properties were allotted to the Official Assignee as the assignee of the insolvent and he was ordered to pay to the plaintiff certain costs. The plaintiff in execution of his decree for costs, attached the properties awarded to the Official Assignee. The applicant, Binodini Dassee, put forward a claim to the properties as her own, and the Alipore Court allowed her claim. Thereupon the Official Assignee made an application before the Registrar in Insolvency and obtained the order for the examination of Binodini Dassee under section 36 of the Presidency Towns Insolvency Act, which was now sought to be set aside.

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Mr. Langford James, for the applicant. An order for the examination of a person under section 36 can not be made after the insolvent has obtained his discharge. On the discharge of the insolvent, the insolvency comes to an end and the Court's powers under section 36 cease. If the provisions of sections 33 to 37 were applicable even after the insolvent's discharge, section 43 would not have been necessary. The application of the Official Assignee, on which the order for examination was made, disclosed no grounds for making such an order. The Court ought not to make an order under section 36 in the present case, as the applicant will be prejudiced in any litigation

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that may ensue between the Official Assignee and herself.

Mr. N. N. Sircar (with him *Mr. B. K. Ghosh*), for the Official Assignee. The Court's powers under section 36 are very wide. There is nothing in the Act to limit the powers of the Court under that section to the period before the insolvent's discharge. On the discharge of the insolvent, the insolvency does not come to an end for all purposes. Even if the application of the Official Assignee did not contain sufficient materials on which an order under section 36 could be made, there are now before the Court upon this application abundant materials on which the order can be made, and the Court should not set aside the order simply on that ground.

There is no pending litigation now between the Official Assignee and the applicant and, therefore, the question of prejudice does not arise.

Cur. adv. vult.

GREAVES J. This is an application by Sreemutty Binodini Dassee to set aside an order of the Registrar in Insolvency, dated the 6th June 1916, for her examination under section 36 of the Presidency Towns Insolvency Act. The order was obtained upon the application of the Official Assignee and the applicant seeks to set aside the order on three grounds: (i) that the insolvent having obtained his discharge no order under section 36 can now be made; (ii) that the application on which the order was made disclosed no grounds for making such order; (iii) that as litigation may ensue between the applicant and the Official Assignee, an order for her examination would be inequitable.

I deal with the third ground first; and with regard to this ground I hold that the case is upon the facts eminently one for the examination of the applicant

under section 36, if such an examination can now be ordered, and I see no ground for refusing an order under section 36 because litigation may ultimately ensue between the Official Assignee and the party to be examined; if this were so, it would in many cases render the valuable provisions of section 36 nugatory. The case seems to me quite different when there is actual litigation in progress between the Official Assignee and the person sought to be examined.

With regard to the second ground, it appears from the petition of the Official Assignee that the order was made upon his allegation that the applicant appeared capable of giving information respecting the insolvent's dealings and properties. I should not myself have made an order upon an application of this kind. I think the Official Assignee should state shortly the nature of the information likely to be given by the person sought to be examined, and the dealings or properties of the insolvent to which such information will relate. But I have before me ample materials to justify the making of the order, if it can be made at this stage, and accordingly I do not propose to set aside the order upon this ground.

It now remains to consider the first and most important ground upon which the order is sought to be set aside.

Section 36 provides that the Court may, on the application of the Official Assignee, or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property.

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The section fixes no limit during which the powers under it may be exercised, but it was urged before me, on behalf of the applicant, that the powers cease on the insolvent's discharge, because section 43 of the Act provides what is to be done by a discharged insolvent to assist in the realization of his property and, it is said, that section would not have been necessary if the provisions of sections 33—37 were still subsisting after the insolvency. It may be that so far as the insolvent is concerned, the provisions of section 36 are not applicable after his discharge, having regard to the provisions of section 43, but I see no reason why this should be so in the case of the other persons referred to in section 36. To so hold would, I think, be prejudicial to the insolvent himself, as it might delay his obtaining his discharge, as, if the Court's powers under section 36 came to an end upon the same being granted, the Court might hesitate to grant such discharge at as early a period as, but for this, it would otherwise do. The powers of the Court are very wide under section 36, and I think the Court would, in using them, be careful to see they were not used unduly and unnecessarily after a considerable time had elapsed from the time of the discharge, but I see nothing in the Act to limit the powers of the Court under section 36 to the period before discharge, and accordingly I think, in a proper case, the Court can even after discharge use the powers given by section 36. I think the present is a proper case upon the materials before me, and accordingly the first ground of the application also fails and the application must be dismissed with costs.

A. K. R.

*Application dismissed.*Attorney for the petitioner: *Sasi Sekhar Banerjee*.Attorney for the Official Assignee: *G. C. De.*

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[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Burmese Law—Inheritance—Right of eldest son in a family to a share of the estate on the death of the father—Right of election to take share or not—Limitation Act (IX of 1908) Sch. I, Art. 123—Manu Kyay, Book X, Rules 5 and 14.

By the Burmese Buddhist law of succession laid down in the Manu Kyay, Rule 5 of Book X, the eldest son in a family takes on the death of the father a definite one-fourth share of the estate, a right which he is at liberty to assert within any period not outside that fixed by Art. 123, Sch. I of the Limitation Act of 1908, as the period within which a claim must be made for a share of property on the death of an intestate. There is no authority to the effect that the eldest son has merely a right to elect within a certain limited period whether he will take the share of the property or not.

APPEAL No. 38 of 1916 from a judgment and decree (31st March 1915) of the Chief Court of Lower Burma, which reversed a decree (20th December 1913) of the Court of the District Judge of Thaton.

The plaintiff was the appellant to His Majesty in Council.

The plaintiff was the eldest son of one U Tu, who died intestate on 19th December 1906. The defendants were Ma Thit, his widow, his children other than the eldest, and a grandchild. He left moveable and immoveable property which was valued in the plaint at Rs. 2,39,590.

^o *Present*: THE LORD CHANCELLOR (LORD BUCKMASTER), LORD SHAW, LORD WRENBURY AND MR. AMEER ALI.

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A. K. R.

*Application dismissed.*Attorney for the petitioner: *Sasi Sekhar Banerjee*.Attorney for the Official Assignee: *G. C. De.*

PRIVY COUNCIL.

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Nov. 13.

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² *Present*: THE LORD CHANCELLOR (LORD BUCKMASTER), LORD SHAW, LORD WRENBURY AND MR. AMEER ALI.

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The suit which gave rise to this appeal was brought on 24th June 1913, and the plaintiff claimed a one-fourth share in his father's estate by the Burmese Buddhist law as being the eldest or auratha son of the deceased.

Defendants 1, 3 (a son), 4 (a daughter), and 6 (a granddaughter in their defence denied that the plaintiff was the eldest or auratha son, and in the 5th paragraph of their written statement alleged that even if he was so entitled he "had exercised his election not to claim such share, and could not now do so." They further alleged that the plaintiff had forfeited all right to inherit by reason of his undutiful and unfilial conduct of which they gave particulars.

The defendant 2, a son, did not appear; and defendant 5 admitted the plaintiff's claim and asserted a right as his adopted daughter which was denied by the defendants contesting the suit.

Three issues were raised, the first of which was whether the plaintiff was the auratha son of U Tu and as such entitled to claim one-fourth of the estate? but it was agreed that it was an unnecessary issue, as all matters in dispute were raised in the second (if the plaintiff was ever entitled to a one-fourth share did he elect not to claim such share?), and third (did the plaintiff forfeit his right to inherit by reason of undutiful and unfilial conduct?) issues.

The Additional District Judge found, as a fact, that the plaintiff was the auratha son, and that was not now disputed.

The evidence of the plaintiff's alleged renunciation of his claim rested solely on the fact that he made no demand for a share until more than six years after his father's death. On that issue the District Judge said: "on the second issue it has been argued that exercise of action by the plaintiff must be within a reasonable

time, and if not so taken he must be deemed to have forsaken it." On this issue the Judge held that the suit was not barred by limitation, and that there was no evidence to support the allegation that the plaintiff had abandoned his right of inheritance.

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The Additional Judge found, on the third issue, that the plaintiff had not been guilty of undutiful or unfilial conduct, and therefore had not lost his right of inheritance, and that he was entitled to the one-fourth share which he claimed. He made a decree accordingly for the plaintiff.

The defendants 1, 3, 4 and 6 appealed to the Chief Court from the decision of the District Court on the ground that the evidence showed that the plaintiff's misconduct had been such as to debar him from inheriting; and that he had elected to forego his right to the share of an auratha son: but the ground as to misconduct was not argued or decided in the Chief Court (ORMOND and TWOMEY JJ.) the material portion of whose judgment was as follows:—

"The plaintiff made no demand from his mother in respect of his $\frac{1}{4}$ share until $6\frac{1}{2}$ years after his father's death; but, on the other hand, he collected the rents of the property for his mother as being her property.

"The question in this appeal is whether an eldest son must act with reasonable promptitude in exercising his option of taking $\frac{1}{4}$ of his parents' joint property on the death of his father, or whether he has 12 years within which he can exercise that option under article 123 of the Limitation Act. We are referred to the case of *Maung Po Min v. U Shwe Lu* (1) where it is held that the period of limitation for the recovery of $\frac{1}{4}$ share by an eldest son is 12 years from the date of the parents' death, under article 123. The facts of that case are not given in the report: but we must assume that the eldest son's option had not lapsed owing to delay in exercising it. The effect of undue delay on the part of the eldest son was not considered and no question was raised on that point. The case can only be regarded as an authority for applying article 123 and reckoning the period of limitation from the date of the parent's death when as a matter of fact the eldest son has acted promptly. In the present case we are not concerned with the

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period of limitation. If the plaintiff had demanded his quarter share promptly after his father's death and had been refused, he would no doubt have 12 years from the date of his father's death to sue for the share. But though he was a married man with a family of his own and living apart from his mother when his father died, he did nothing for $6\frac{1}{2}$ years and the question we have to decide is whether he should not therefore be deemed to have abandoned his claim to partition and elected to wait for his mother's death and then share with his brothers and sisters. It is not expressly provided in the Dhammathats that the eldest son must decide promptly which course he will take. But from the nature of the option it is necessary, in the interests of the family, that it should be exercised without delay. According as it is exercised or not, the mode of managing the property must vary and the prospects of the other heirs would also vary. It can hardly be intended that a widow should be compelled to keep a quarter of the estate tied up indefinitely on the chance that any time within 12 years the eldest son may demand his $\frac{1}{4}$ share. Such a restriction would materially affect the widow's management of the estate. If such a course were admissible the eldest son might conceivably wait till $\frac{3}{4}$ of the estate has through some misfortune been lost and then claim the whole of the remaining quarter to the entire exclusion of his brothers and sisters, although they may have counted for years on coming in when their mother dies and sharing equally with the eldest son.

"We think that the right given to the eldest son (Manu Kyay, Book X, section 5) of claiming a quarter share of the joint estate on his father's death must be exercised as soon as possible after that event and that if the option is not exercised without unreasonable delay it lapses altogether.

"The appeal is allowed. The decree of the lower Court is set aside and the suit is dismissed with costs in both Courts."

On this appeal,

De Gruyther, K. C., and *E. U. Eddis*, for the appellant, contended that the claim of the appellant had been wrongly treated as if it were an option which had to be exercised as soon as possible after the father's death, and was lost if not enforced without delay. But the one-fourth share the appellant claimed was a right to which he was entitled under the Burmese Buddhist law. Reference was made to *Mingye's Digest* where the rules of succession are given; and to *Ma Nhin Bwin v. U Shwe Gone* (1) and the Manu

Kyay, Book X, Rule 5. On the father's death three-fourths of his estate is absolutely vested in the mother, and the eldest son takes a one-fourth share. No child gets any definite share except the eldest son: Mingye's Digest, page 90, section 34. Children other than eldest son are entitled to partition only on the mother's death: Attasankepa (published in 1907 under the authority of the Government), see Chan Toon's Principles of Burma Buddhist law, page 17. There is no authority for the proposition that the eldest son does not get a one-fourth share as a right, but only has an option which must be exercised promptly or it may be lost. On the contrary, the one-fourth share vests in the eldest son by inheritance on the death of the father wholly irrespective of any claim by him: Attasankepa, section 155. There was no evidence whatever that the appellant had elected not to claim the one-fourth share to which he was entitled, or had in any way abandoned his claim. He was by law entitled to enforce his right at any time within the statutory period of limitation which is 123 Schedule I of the Limitation Act, 1908, which gives 12 years from the date when the share becomes due or payable, that is, in this case, the death of the father. The Chief Court holds that he must assert his claim to get a title, but it is submitted that he has a title by law; and to say that the rights of the younger children may possibly be affected by his delay was not a good reason for the contention that he was bound to put in his claim at once. Reference was made to the Manu Kyay, Book X, Rule 14, as to the division of the estate on the mother's death.

Sir H. Erle Richards, K. C., and F. J. Coltman, for the respondents, contended that the appellant not having claimed as auratha son the one-fourth share of the joint estate of his parents within a reasonable time

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after the death of his father, his right to claim division of the estate on his father's death lapsed. The eldest son had no absolute right, but only a right to claim partition. If he does claim it, he was entitled to a one-fourth share, but he must claim it within a reasonable time after his father's death. He has brought his suit only after $6\frac{1}{2}$ years which, it was submitted, was not a reasonable time. The question is whether the action of the appellant was such that, he is entitled to succeed. The children have no interest in the estate during the life of the parents; but on the death of either parent or of both they have a right to division of the property: Chan Toon's Principles of Burmese Buddhist law, page 104. The appellant was not entitled to stand by and wait. He could, if he wished, abandon his share, and it was submitted that is what he did. The respondents contend that he elected not to claim his one-fourth share of the estate, and so he lost his right to it. His conduct in managing the property after his father's death shows that he acquiesced in its remaining as it was: see Chan Toon's Principles of Burmese Buddhist law, page 104. Every eldest son did not inherit; certain claims by him were excluded; see Chan Toon's Principles of Burmese Buddhist law, page 144 [*Eddis* referred to page 143 last 5 lines]. *Ibid.* page 121 contemplates that if the eldest son has not claimed his share, he is to come in with the other children and share the estate on the death of their mother; see Manu Kyay, page 273; and that is what the respondents say he elected to do. Mingye's Digest, section 30; Manu Kyay, Book X, Rule 14; and *Ma Su v. Ma Tin* (1). As the appellant did not make his claim promptly and get his share segregated, he has, it was submitted, to wait until his mother's death when all the other children would be entitled to

shares; his share then might be quite a different share from that he now claimed.

The appellants were not called upon to reply.

The judgment of their Lordships was delivered by

The LORD CHANCELLOR. The appellant in this case is the plaintiff in certain proceedings which were instituted in the District Court at Thaton, by which he claimed to have one-fourth share of the estate of his father determined and allotted to him. The claim is stated quite clearly, and with commendable brevity, in the plaint, which sets out allegations which are no longer in dispute, namely, that the plaintiff was the eldest son of his father; that his father died on the 19th December, 1906, intestate, and left a widow and certain other sons and daughters him surviving.

The ground upon which that claim was resisted depended in the main upon an allegation that the plaintiff had behaved in an unfilial and illegal way, and, consequently, had forfeited his rights. That defence was disposed of by the learned Judge who heard the cause, who, although he appears to have been greatly embarrassed by the untrustworthiness of the evidence before him, decided that the defendant had not established this allegation.

The only other matter left for decision was one which, according to the defendants' contention, arose upon paragraph 5 of their defence. That paragraph suggested that the plaintiff had not in fact any share in the estate, but that, on the death of his father, he had obtained a right to elect whether he would have that share or no, and that, in the absence of election within a reasonable time, the claim could not now be brought forward. That view was supported by the Chief Court, and from their decision this appeal has been brought.

The whole of that contention depends, as Mr. Coltman

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very fairly stated, upon considering the two different rules of the Damathat which are applicable to this case. They are Rule 5 and Rule 14. The first relates to the partition of an estate upon the death of the father, and it is under that rule, and, as their Lordships understand it, under that rule alone, that the right of the plaintiff in this case arises. It is in these words: "When the father has died the two laws for the partition of the inheritance between the mother and the sons are these: Let the eldest son have the riding horse" and certain ornaments, and it then proceeds: "Let the residue be divided into four parts, of which let the eldest son have one, and the mother and the younger children three."

It is said that Rule 14, which deals with the division of the estate on the death of the mother, shows that, if the one-fourth had not been segregated, and paid over to the eldest son after the father's death, and before the mother died, there would be a different method of distribution, one that might be more favourable, or that might be more unfavourable, to the eldest son, but which, certainly, would not be the same as that to which he was entitled under Rule 5.

Their Lordships do not think that it is desirable to express an opinion upon the true construction of Rule 14. It is a matter that may arise for determination hereafter, and its determination is not relevant to the present question because, even assuming in favour of the respondents, that the rights of the eldest son would change in the event of his not having segregated his one-fourth before his mother's death, it by no means follows that the right which he got under Rule 5 was merely the right to elect within a certain limited period of time whether he would take the property or no. Their Lordships can find no ground whatever for the suggestion that he got anything

under Rule 5 excepting a definite one-fourth part of the estate, a right which he was at liberty to assert within any period that was not outside the period fixed by article 123 of the Indian Limitation Act as the period within which a claim must be made for a share of property on the death of an intestate.

The respondents have certainly urged before their Lordships all that could be urged in support of their view, but their Lordships find themselves quite unable to accept their arguments or to agree with the view which was formed by the Chief Court in this matter.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the Chief Court set aside with costs, and the decree of the District Court restored.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant : *Sanderson, Adkin, Lee & Eddis.*

Solicitors for the respondents : *Arnould & Son.*

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[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Mortgage—Usufructuary mortgage, construction of—Balance remaining due to mortgagee at end of term of mortgage—Allegation in plaint of wrongful acts by mortgagor by which mortgagee was deprived of part of his security—Transfer of Property Act (IV of 1882), ss. 58, 59 and 68—Mortgage deed unattested and not enforceable as a mortgage—Privy Council, practice of—Reinstatement and rehearing after decision of case ex parte.

The question for determination on this appeal was whether the respondents (mortgagees) were entitled to recover from the appellant (mortgagor) the balance due on a usufructuary mortgage dated 14th April 1896, where it was alleged that they had been deprived of part of their security by the wrongful acts of the mortgagor. It had been calculated that the amount borrowed, with interest, would be paid off by the rents of the properties mortgaged, on 14th January 1903 when they were to be returned to the mortgagor. Both parties acted on the deed, but on the date mentioned it was found that the mortgagee in possession had not by the collection of the rents received sufficient to discharge the principal of the loan with interest as mentioned in the deed. In a suit brought by the mortgagee on 13th January 1909, the deficiency was attributed in paragraphs 6 and 7 of the plaint to the facts that the defendant (mortgagor) had taken rents which should have gone to the mortgagee, but which had not been paid over to him by the mortgagor, and that the rents in some cases were less than those mentioned in the deed, and those were wrongful acts complained of. The claim was for a mortgage decree under Order XXXIV, rule 4 of the Civil Procedure Code, 1908, or in the alternative for a decree for the amount due on the footing of the personal liability of the mortgagor. In the course of the suit it appeared that the mortgage deed had not been attested and the Subordinate Judge held that it could not, having regard to

* *Present*: LORD PARKER OF WADDINGTON, LORD SUMNER AND SIR LAWRENCE JENKINS.

section 59 of the Transfer of Property Act (IV of 1882) be enforced as a mortgage, which decision as it was not appealed from became final. The sole question therefore was whether the mortgagor was personally liable. The facts on which the allegations of wrongful acts by the mortgagor were based were not investigated, but both Courts in India held that on the construction of the deed it imposed a personal liability on the mortgagor and they made decrees in his favour.

Held (reversing those decisions), that the nature and terms of the deed were such as to show that it was not originally intended that the mortgagor should be personally liable. The respondent ought to be given an opportunity of proving the allegations in paragraphs 6 and 7 of the plaint and of establishing that those facts were sufficient to bring section 68 of the Transfer of Property Act into operation. The position of the mortgagor under that section could not, however, by reason of the deed, be better than it would have been if the mortgage had been duly attested. The case was for that purpose remitted to India for further trial.

After the appeal had been heard *ex parte* and judgment had been given in favour of the appellant, the respondents were allowed to have it reinstated and reheard on the ground that the person with whom they came to an agreement to defend the appeal on their behalf, and to whom they advanced funds to pay the expenses of entering appearance, and taking other necessary steps in the conduct of the appeal, defrauded them, misappropriated the money without doing anything in the matter of the appeal, and left them in complete ignorance of its progress, until they discovered that there was not a word of truth in his misrepresentations and that the appeal had been decided *ex parte* against them. They had to pay the costs of the first hearing as the appellant was in no way to blame.

APPEAL No. 82 of 1915 from a judgment and decree (30th August 1911) of the High Court at Calcutta, which affirmed, with a slight variation, a judgment and decree (30th June) of the Court of the Subordinate Judge of Hazaribagh.

The representative of the defendant was the appellant to His Majesty in Council.

The question for determination in this appeal was whether the respondents (mortgagees) were entitled to recover from the appellant (mortgagor) the balance due on a zarbhana mortgage, dated 14th April 1896, where it was alleged that they had been deprived of

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part of their security by the wrongful acts of the mortgagor.

The original mortgagor, Ram Narayan Singh, executed the mortgage deed, as security for a loan of Rs. 1,30,000, in favour of the predecessor in title of the respondents. For repayment of the loan with interest at $7\frac{1}{2}$ per cent. per annum the deed provided that the mortgagee should be put in possession of certain properties for certain specified periods until 14th January 1903, by which time it was calculated that the whole of the mortgage debt with interest would be paid off, leaving a small balance in favour of the mortgagor. The properties were divided into various sets or groups, and were in the actual possession of tenants from whom the mortgagee was to collect the rents and in case of any arrears he was authorised to bring suits to recover such arrears, and to eject defaulting tenants. On ejectment of a tenant and resumption of his property by the mortgagor, the mortgagee was to get the rent of such property from the mortgagor until it was leased to another tenant. It was provided that the mortgagor should give the "thika pottah of the resumed villages," and that the mortgagee should have "no right to grant thika pottahs of such villages." There was a clause that "if, for any reason, the jama of any village mentioned in the bond decreases, the zarbharnadar (mortgagee) shall be entitled to get from me, the executant, the amount of decrease with interest at the above-mentioned rate." The mortgagor and his heirs and representatives undertook not to collect rents, but in case they did so by mistake, they should be liable to pay the amount so collected with interest to the mortgagee, and it was stipulated that except in the case of such a collection the mortgagor was not to be liable for non-collection. It was provided also that at any time during the term

of the mortgage the mortgagor had power to recover possession of the mortgaged properties on payment of the principal and interest then due.

The mortgagee was duly put in symbolical possession of the mortgaged properties; but he and his successors were deprived of a part of their security by the following wrongful acts of the mortgagor and his successors: (i) the mortgagor had on the death of the tenants of some of the mortgaged properties which were mokurari, khairat, and jagir villages, resumed the properties as zamindar as he was quite entitled to do; but though he remained in possession of them until the end of the term of the mortgage, he had paid the mortgagee nothing in respect of them; (ii) the mortgagee found the rents realisable in respect of some of the mortgaged villages were less than those mentioned in the deed; (iii) from others of the mortgaged villages he found that the mortgagor had collected the rents in advance, and that he was consequently unable to realise in those cases the amounts stated in the deed; (iv) also he found that during the term of the mortgage the mortgagor on ejectment of the defaulting tenants resumed their villages, but had neither paid the amounts of the rent decrees, nor subsequent rents due in respect thereof.

The mortgagees' successors, the respondents, duly delivered to the successors of the mortgagors, on 14th January 1903, possession of such of the mortgaged properties as were in their possession; but owing to the wrongful acts of the mortgagor the rents collected failed to satisfy the mortgage money and interest and a considerable sum remained due to the mortgagees.

By a letter, dated 17th October 1903, the mortgagor requested the mortgagees to send him an account of unrealised rents, and the mortgagees, on 16th November

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1903, submitted such an account. On 28th December 1903, the mortgagor wrote to the mortgagees a letter signed by him to the effect that "arrangements are being made for the money," but he never carried out his promise to pay.

The suit which gave rise to the present appeal was brought on 13th January 1909 by the respondents to recover Rs. 1,57,985 odd, the balance of the amount due on the mortgage. The plaintiffs claimed a mortgage decree under Order XXXIV, rule 4 of the Civil Procedure Code, 1908, or in the alternative a simple money decree for the amount, "or whatever may be found due with costs and subsequent interest . . . to be realised out of the properties which devolved on him (the defendant) after his father's death." The first claim was disallowed by the Subordinate Judge on the ground that the mortgage was invalid as a mortgage for want of attestation as required by section 59 of the Transfer of Property Act, 1882, and that claim has been abandoned by the plaintiffs.

This appeal relates only to the alternative claim which was based (in paragraphs 6 and 7 of the plaint) on the above-mentioned allegations as to the wrongful acts of the defendant and his father, on account of which the plaintiffs had been unable to realise their security, and were, it was submitted, entitled to recover the balance of the mortgage money sued for, with interest.

The defendant denied the allegations as to the wrongful acts, and raised the plea of limitation. He also denied his liability to pay the mortgage money which it was stipulated was to be realised from the rents and profits of the mortgaged properties, and contended that there was no personal covenant by the mortgagor to pay.

Further he contended that the suit was not main-

tainable, and disputed the plaintiff's accounts annexed to the plaint.

The following issues (excluding those not material) were framed: (i) Is the suit maintainable in its present form? (ii) Have the plaintiffs or any of them any cause of action for the present suit? (iii) Is the claim or any portion of it barred by limitation? (iv) Are the plaintiffs entitled to recover, and, if so, what amount under the bond in suit from the defendant personally or otherwise? (v) What amount did the plaintiffs actually recover from the zarbharna property? and what amount is still due to the plaintiffs? (vii) To what relief, if any, are the plaintiffs entitled? (x) Have the plaintiffs any right of suit? If so, is the suit maintainable?

The defendant in answer to interrogatories admitted the facts above mentioned relating to the alleged wrongful acts on his part.

Issues (iv) and (v) have not yet been dealt with by the Courts in India.

The Subordinate Judge decided issues (i), (ii), (iii) and (x) in favour of the plaintiffs. He was of opinion that "there had been actual breach of contract on account of the laches of the mortgagor, and wrongful acts on his part which were stated in the plaint, for which the money could not be recovered. Thus there cannot be any question regarding the plaintiffs getting the alternative relief." He held that the period of limitation was six years, and that the cause of action arose on 14th January 1903, and consequently the suit (instituted on 13th January 1909) was not barred. The contention that whenever the plaintiffs failed to collect the sums specified in the deed at the appointed times there was a breach of contract, and that limitation ran from the date of each successive breach was rejected by the Subordinate Judge; but he held that even if it

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were well founded, the letter signed by the mortgagor, dated 28th December 1903, was an acknowledgment within the meaning of section 19 of the Limitation Act, 1908 and saved the suit from being barred in respect of all claims arising from and after the date of that letter.

Issues (iv) and (v) the Subordinate Judge referred to a commissioner, as relating to accounts, for determination.

The defendant appealed to the High Court, and a Bench of that Court (SIR ASUTOSH MOOKERJEE and H. W. C. CARNDUFF JJ.) agreed in the main with the Subordinate Judge, stating that "the circumstances under which the suit was commenced by the plaintiffs respondents have not formed the subject of controversy in this Court," and agreed with the Court below that the suit was maintainable, that the defendant was bound to repay the mortgage money, and that the cause of action arose on 14th January 1903 and that the suit was therefore not barred. The High Court, however, was of opinion that issues IV and V ought to be determined by the Court, and not by a commissioner, and that the preliminary decree made by the Subordinate Judge should be set aside and the case remitted to him for determination of those issues. A decree to that effect was made.

Leave to appeal to His Majesty in Council was refused by the High Court on the ground that no substantial question of law was raised on the appeal. Special leave to appeal was, however, granted by an Order in Council, dated 11th February 1913. On his death his son and heir, Lachmi Narayan Singh, was brought on the record.

The appeal was first heard *ex parte* on 7th April, and on 12th May judgment was given against the respondents who on 28th July put in a petition to

have the appeal reinstated and reheard. The petition stated that when the petitioners had information from the High Court that the record of the appeal had been sent to England they made an arrangement with a person who represented himself to be the Calcutta agent of Messrs. T. L. Wilson & Co., solicitors in London, for the due conduct of the appeal on their behalf; that they provided him with money (Rs. 675 in July 1915) and he purported to give them information as to the appeal. In March 1916 they heard rumours that the man was not the agent of T. L. Wilson & Co., and they interviewed him when he told them he had ceased to be agent for T. L. Wilson & Co., but had instructed other solicitors to act for the petitioners in the appeal, and that it would come on in the next term; and they paid him Rs. 325. In the middle of April, criminal prosecutions were started against the man for having falsely acted as agent for Wilson & Co., and the petitioners wrote to Mr. E. Dalgado, a solicitor in England, to enter appearance for them which they found had not been done, and instruct counsel on their behalf. On 8th June they received a letter from Mr. Dalgado informing them that the appeal had been set down and heard *ex parte* and judgment allowing the appeal had been given. Then for the first time the petitioners discovered that the person employed by them to conduct the appeal had defrauded them and misappropriated the money given him for the expenses of the appeal without in fact doing anything in the matter of enabling the petitioners to appear as respondent; and that there was not a word of truth in the representations made by him. The petitioners further stated that they were advised they had a good case on the merits, and submitted that they had not been guilty of laches, and that their non-appearance was not caused by their

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neglect or delay, but was due to the fraud of their agent, and that it was a fit case for the indulgence of his Majesty in Council.

An order was made on the petition that the appeal should be re-instated and heard, the petitioners paying the costs that had been thrown away by the first hearing whatever they might be as the appellants were admittedly not to blame. The security, if discharged, to be restored. The case for the petitioners to be lodged by 30th September. All proceedings to be stayed in the meantime.

The re-hearing took place on 26th and 27th October.

De Gruyther, K. C., and *B. Dubé*, for the appellant, contended that on the contract between the parties there was no personal liability on the appellant to pay the mortgage debt or any part of it. Under the mortgage deed the mortgagee had only one remedy, and that was to get his debt paid by the collection of the rents of the properties whilst he was in possession under the deed as a usufructuary mortgage. Reference was made to the Transfer of Property Act (IV of 1882), section 58, defining the different kinds of mortgages, and by clause (d) defining a usufructuary mortgage which was the form of the bond in suit. The provisions of the deed were in equity binding on the parties who both acted in accordance with its provisions: *Mahommed Musa v. Aghore Kumar Ganguli* (1). The fact of its non-attestation which made it ineffective as a mortgage, also excluded any personal liability under it, if any such liability existed. The contract though invalid could not be disregarded where, as here, it had been acted upon by the parties to it. Under the deed the mortgagee took any risk there might be of a deficiency in the collection

of rents; the deed expressly stipulated that the appellant should not be liable to pay any thing except in the way stipulated. Even if personal liability existed the suit as to that would be barred by the six years period of Limitation under article 116, Schedule I of the Limitation Act, 1908. The true cause of action was not on the deed but on certain acts done subsequently by the appellant and alleged to be wrongful acts giving rise to separate and independent causes of action all of which were now barred by limitation. The action had been wrongly framed.

Sir R. Finlay, K. C., and *J. M. Parikh*, for the respondent, contended that whatever the cause of the deficiency in the rents, the appellant had expressly made himself personally liable to pay it. If, however, the deed did not create such a liability the wrongful acts or default of the appellant, which had the effect of depriving the respondents of a part of their security, gave them a cause of action for the amount of the debt remaining unpaid. They would, when proved, make the appellant personally liable under section 68 of the Transfer of Property Act. The letter of 28th December 1903 was an acknowledgment of the debt which by virtue of section 19 of the Limitation Act, 1908, saved the suit from being barred: *Narayana Ayyar v. Venkataramana Ayyar* (1), and *Ittappan Kuthiravattat Nayer v. Nanu Sastri* (2) were cited. [SIR LAWRENCE JENKINS referred to section 20 of the Limitation Act, 1908]. That section would also prevent the suit being barred as rents had been collected until 1903. No ground, it was submitted, had been shown for disturbing the order now appealed from.

De Gruyther, K. C., in reply. The effect of the part performance by the parties of the contract notwithstanding it was not enforceable, must be taken into

(1) (1902) I. L. R. 25 Mad. 220. (2) (1902) I. L. R. 26 Mad. 34, 37.

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consideration. The acknowledgment relied on of 28th December in any case only referred to the obligation created by the mortgage bond to pay in the manner therein stipulated, and was not an acknowledgment to pay in any other way: *Kalka Singh v. Parasram* (1). A new cause of action was now raised which is not that raised in the plaint.

The judgment of their Lordships was delivered by

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LORD PARKER. This is the rehearing of an appeal from the High Court at Calcutta, dated the 30th August, 1911, which set aside a preliminary decree of the Subordinate Judge and remitted the case to the Court of the Subordinate Judge to be dealt with in accordance with certain directions contained in the judgment of the High Court. At the original hearing the present respondents did not appear and the appellant obtained an order setting aside the decree of the High Court at Calcutta and dismissing the action in which the appeal arose. Subsequently the respondents obtained an order of His Majesty discharging the order thus made on the ground that it was by the fraud of his agent that he was not represented by counsel at the hearing, and directing the appeal to be reheard, the costs thrown away to be dealt with upon such rehearing. The appeal has accordingly been reheard before their Lordships, who have had the advantage of hearing counsel on both sides.

The facts out of which this action arose may be stated as follows: In the year 1896, Maharajah Sri Sri Ram Narayan Singh Bahadur (whom their Lordships will hereafter refer to as the mortgagor) executed in favour of Rai Jadu Nath Mukerji Bahadur (whom their Lordships will hereafter refer to as the mortgagee) a deed dated the 14th April in that year.

(1) (1894) I. L. R. 22 Calc. 434, 444; L. R. 22 I. A. 68, 75.

This deed recites that the mortgagor had borrowed from the mortgagee a sum of 1,30,000 rupees, and for the repayment of the loan with interest, as therein mentioned, had given in zarbharna the rents and cesses of the mokurari villages therein described. The villages are divided into groups, the distinguishing mark of each group being the date at which the mortgagee is to take possession. The possession of all the villages is to be redelivered to the mortgagor on the 14th January 1903, it being calculated that by that date the amount due to the mortgagee for principal and interest will have been satisfied out of the rents of the several villages. The deed contains an elaborate schedule showing the details of this calculation. It also expressly precludes the mortgagor collecting any of the rents during the term of the zarbharna. It also contains the following clause:—

"If by mistake I " (the mortgagor) "or my heirs make any collection, then I or my heirs shall be liable to pay the amount collected with interest at the above rate Except in such a case, for no other reason and on no other account, the zarbharnadar has and shall have any claim whatever against me or my heirs and representatives on the ground of realisation and non-realisation. If a claim is made, it is and shall be totally null and void."

It is common ground that the mortgagee obtained possession of the several groups of villages at the respective dates in that behalf specified in the deed, and retained possession thereof for the term of the zarbharna, and at the expiration of such term redelivered the villages to the mortgagor. The mortgagee, however did not in fact receive by the collection of the rents sufficient to discharge the principal of the loan with interest as mentioned in the deed.

On the 13th January, 1909, within six years from the expiration of the term of the zarbharna, the respondents, who represent the mortgagee, instituted the present action. By their plaint they asked relief

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either (i) in accordance with Order XXXIV, Rule 4, of the Civil Procedure Code, on the footing of an existing mortgage of the villages described in the deed; or (ii) on the footing of a personal liability on the part of the mortgagor. They claimed to realise what was due to them, in the first alternative, out of the mortgaged villages; and, in the second, out of the estate of the mortgagor who was then dead.

In the course of the action it appeared that the deed of the 14th April, 1896, was unattested, and it was accordingly held by the Subordinate Judge that it could not, having regard to The Transfer of Property Act, 1882, section 59, be enforced as a mortgage. The respondents did not appeal from and are bound by this decision. The sole question which remained therefore was whether there was any personal liability on the part of the mortgagor for payment of that portion of the loan and interest which remained unsatisfied out of the rents of the villages. In considering this question it must be borne in mind (i) that a loan *prima facie* involves such a personal liability; (ii) that such a liability is not displaced by the mere fact that security is given for the repayment of the loan with interest; but (iii) that the nature and terms of such security may negative any personal liability on the part of the borrower. It must also be borne in mind that even if the mortgagor be in the first instance under no personal liability, such liability may arise under section 68 (b) or (c) of The Transfer of Property Act. From the argument advanced by the respondents it now appears that paragraphs 6 and 7 of the plaint were intended to show that the object of the allegations made therein was to raise a case under this section. The truth of these allegations was not investigated at the trial, so that the Subordinate Judge could not have

relied on them. He held that although the document of the 14th April, 1896, was, according to its true construction, merely a usufructuary mortgage non-enforceable for want of attestation, the mortgagor came under personal liability for payment and that this liability was not statute-barred, and by preliminary decree he referred it to a commissioner to take an account of what had been received by the mortgagee under such mortgage. His reasons for holding that there was such personal liability are somewhat obscure.

Against this decision the present appellant appealed to the High Court, and on the hearing of the appeal the High Court upheld the decision of the Subordinate Judge so far as it determined the existence on the part of the mortgagor of a personal liability not barred by statute, but discharged the reference to a commissioner on the ground that such a reference would involve the trial of the issues raised in paragraphs 6 and 7 of the plaint, which issues could not be properly referred to a commissioner, but ought to be determined by the Subordinate Judge himself. The action was, therefore, remitted to the Subordinate Judge to be disposed of in accordance with this decision. The High Court held that the deed of the 14th April, 1896, according to its true construction, imposed on the mortgagor a personal liability, or at any rate did not negative the personal liability incident to a transaction of loan.

The appellant further appealed to His Majesty in Council, and as before mentioned the case came before the Board in the absence of the respondents. The Board were of opinion that having regard to the nature of the deed of the 14th April, 1896, which was a usufructuary mortgage only, and to its terms, any personal liability on the part of the mortgagor was

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excluded; and that though the allegations of paragraphs 6 and 7 of the plaint might, if established, give rise to other rights of action, such rights could not be enforced in an action based substantially on a personal liability arising by implication from the terms of the deed itself. In the absence of the respondents the attention of the Board does not seem to have been directed to section 68 of The Transfer of Property Act, 1882, or to the effect of that section if the allegations of paragraphs 6 and 7 of the plaint were established.

Their Lordships, after hearing the respondents, see no reason to differ from the conclusion arrived at upon the first hearing of this appeal, to the effect that the nature and terms of the deed of the 14th April, 1896, are such as to show that it was not originally intended that the mortgagor should be personally liable. They think, however, that the respondents ought to be given an opportunity of proving the allegations of paragraphs 6 and 7 of their plaint, and of establishing that those facts are sufficient to bring the 68th section of The Transfer of Property Act into operation. It is to be observed that the position of the mortgagor under this section cannot, by reason of the non-attestation of the deed, be better than it would have been if the mortgage had been duly attested. Their Lordships express no opinion with regard to the question of limitation. This must largely depend upon facts, which have not as yet been investigated. For example, the plaint contains a statement of account which contains items of rents collected up to 1908, and the circumstances under which these rents were received may be material in considering whether the mortgagee's right, if any, is statute-barred. In their Lordships' opinion, the proper course is to discharge the orders made by the

Subordinate Judge and the High Court respectively, and to remit the action to the Subordinate Judge for further trial. The appeal having succeeded in part only, there will be no costs of this hearing, but the respondents ought to pay the costs of the previous hearing, which have been thrown away. Their Lordships think the costs incurred before the High Court and the Subordinate Judge should abide the result of the further hearing. Their Lordships will humbly advise his Majesty accordingly.

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Appeal partly allowed.

Solicitors for the appellant: *Barrow, Rogers & Nevill.*

Solicitor for the respondents: *Edward Dalgado.*

J. V. W.

APPELLATE CIVIL.

Before Sanderson C. J. and Mookerjee J.

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v.

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 March 15.

Landlord and Tenant—Suit for ejectment—Notice to quit—Tenancy reserving an annual rent—What notice a tenant holding an annual tenancy is entitled to—Transfer of Property Act (IV of 1882) ss. 106, 107.

The defendant's brother, one Chandu, by a registered *kabuliyat*, took a lease of 2 cottahs of land from the landlord, at an annual rental of Rs. 12 for residential purposes. On the death of Chandu, his heirs, including the defendant, continued to live on the land and, subsequently, the defendant's name was substituted in the landlord's *sherista* as tenant in respect of 2½ cottahs of land at an annual rental of Rs. 15. Thereafter, the

* Appeal from Appellate Decree No 2537 of 1914 against the decree of Upendra Chandra Mookerjee, Subordinate Judge of Hooghly, dated May 25th 1915 reversing the decree of Baroda Prasad Roy, Munsif of Howrah, dated March 12, 1913.

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landlord executed a registered *potta* and let out one bigha of his lands, including the defendant's portion, for a period of 39 years, to one Sheikh Fasiulla, who accepted the defendant as tenant of a portion of it. Fasiulla then transferred his interest to one Mamsa, who, subsequently, sold the same to the plaintiff. On the defendant's failure to pay rent for the 2½ cottahs of land, the plaintiff on the 10th Kartik, 1318, corresponding with the 27th October, 1911, served the defendant with a notice to vacate the land within the 30th Kartik, 1318, corresponding with the 16th November, 1911. The defendant failed to comply with this notice. The plaintiff, thereupon, brought a suit for ejectment and khas possession and for arrears of rent.

Held, that the rent being an annual rent and there being nothing to rebut the presumption in such a case that the tenancy was of a character corresponding thereto, the presumption ought to be drawn that the tenancy was to be an annual tenancy.

Durgi Nikarini v. Goberdhan Bose (1) referred to.

Held, also, that inasmuch as there was a contract of tenancy between the plaintiff and the defendant, but there was no registered instrument as required by section 107 of the Transfer of Property Act, this case came within s. 106 of that Act.

Held, further, that inasmuch as this was a lease of immovable property and not for agricultural or manufacturing purposes, but for some other purpose, it must be deemed to be a lease from month to month terminable on the part of either lessor or lessee, by 15 days' notice expiring with the end of a month of the tenancy.

SECOND APPEAL by Sheikh Akloo, the defendant.

Under a registered *kabuliyat*, dated the 18th January, 1904, the defendant's brother, Sheikh Chandu, took a settlement of 2 cottahs of land at an annual rental of Rs. 12 for residential puposes, from a family named Sanyal, who were the landlords thereof, and built thereon huts at his own expense for himself and his family. Towards the end of 1909 Chandu died, leaving him surviving a son, a daughter, a widow and two brothers including the defendant, as his heirs. After the death of Chandu, his heirs continued to live on the land as co-sharer tenants and,

subsequently, the defendant's name was substituted in the landlord's *sherista* as tenant in respect of $2\frac{1}{2}$ cottahs of land at an annual rental of Rs. 15. Under a registered *potta*, dated the 4th April, 1911, the Sanyals let out one bigha of their lands, including the defendant's portion, for a period of 39 years to one Sheikh Fasiulla, and the defendant was accepted as a tenant of a portion of this land. Sheikh Fasiulla, subsequently, sublet the land he had leased from the landlord for the said period of 39 years, to one Ebrahim Kasuji Mamsa on a rental of Rs. 20 *per mensem*. Ebrahim Kasuji Mamsa, on the 26th September, 1911, under a registered *kobala*, sold his rights under his sublease to the plaintiff. The defendant having failed to pay rent for the $2\frac{1}{2}$ cottahs of the land in his possession, the plaintiff on the 10th Kartik, 1318, corresponding with the 27th October 1911, served a notice on him to vacate the said land within the 30th Kartik, 1318, corresponding with the 16th November, 1911. On the defendant refusing to quit the land, the plaintiff filed a suit against him for ejectment and *khas* possession of the said land, and for arrears of rent in respect of the same. The Court of first instance decreed the suit in respect of the arrears of rent, but dismissed it in respect of the ejectment and *khas* possession. Both the plaintiff and the defendant appealed and the Subordinate Judge decreed the plaintiff's claim in full and dismissed the defendant's appeal. The defendant, thereupon, appealed to the High Court.

Babu Manmatha Nath Roy, for the appellant. The lease of Chandu was under a *registered kabuliyat*. It was for residential purposes and without a fixed term for the tenancy. So long as his heirs were in possession and were willing to pay the rent, they were not

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liable to be ejected from the land: see *Juhooree Lal Sahoo v. Dear* (1). The intention of the parties as evidenced by their conduct, namely, the occupation of the land in dispute by the heirs of Chandu, was that the lease was heritable, although it might not be permanent. See *Narsingh Dyal Sahu v. Ram Narain Singh* (2). The notice to quit was bad on two grounds: *first*, because it was served only on one of the heirs of Chandu instead of on all of them; and, *secondly*, because six months' notice, and not fifteen days' notice was necessary, as the rent reserved was an annual rent. With reference to the first point, the heirs of Chandu were co-sharer tenants with the defendant and lived with him on the land in dispute. All the tenants should have been served with the notice to quit and made parties in the suit. The defendant alone was not liable to be ejected. His possession of the land must continue until the tenancy was terminated by a proper notice to quit served on all the tenants. The heirs were entitled to remain on this land, so long as the tenancy was not terminated by a proper notice served on them.

As regards the second point, the question depended on whether or not this was an annual or a monthly tenancy. The Court of first instance found that the rent payable was annual and not monthly and this finding was not disturbed by the lower Appellate Court. The defendant, therefore, was an annual tenant and six months' notice was necessary. Section 106 of the Transfer of Property Act did not apply, because there was an agreement to the contrary in the present case: *Kishori Mohun Roy Chowdhry v. Nund Kumar Ghosal* (3).

Babu Jyotish Chandra Hazra, for the respondent.

(1) (1875) 23 W. R. 399.

(2) (1903) I. L. R. 30 Calc. 883.

(3) (1897) I. L. R. 24 Calc. 720.

The Court of first instance did not in effect find that the tenancy was an annual one. All that it found was that "the rent payable was annual and not monthly." In the absence of a contract to the contrary, a lease in respect of immovable property for agricultural or manufacturing purposes was a lease from year to year and a lease for any other purpose was from month to month : see section 106 of the Transfer of Property Act. Under section 107 of this Act a lease from year to year, or reserving a yearly rent, must be in writing and registered. No written and registered contract was proved by the defendant in respect of his tenancy which was neither for agricultural nor for manufacturing purposes, but for residential purposes. The tenancy in question, therefore, must be regarded as a tenancy of immovable property for residential purposes falling under section 106 of the Transfer of Property Act: *Debendra Nath Bhowmik v. Syama Prosanna Bhowmik* (1), *Durgi Nikarini v. Go'erdhan Bose* (2).

Babu Manmatha Nath Roy, in reply. The Court of first instance found that the defendant's name had been substituted in the landlord's *sherista* for that of his brother Chandu, the previous tenant. The Appellate Court did not in any way disturb this finding. The defendant's tenancy was, therefore, a continuance of the old tenancy created under the registered *kabuliyat* in favour of Chandu and its operation would be in terms of the *kabuliyat*. There was, therefore, a binding registered contract between the parties. If it be held that one month's notice according to the provisions of the said *kabuliyat* was sufficient, the notice given to the defendant was bad, inasmuch as it was less than one month. The case of *Debendra Nath Bhowmik v. Syama Prosanna Bhowmik* (1) was not

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(1) (1906) 11 C. W. N. 1124.

(2) (1914) 20 C. L. J. 448.

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applicable to a tenancy where the transferee, assignee or representative of the previous tenant was substituted in the latter's place and the old tenancy was under a registered instrument. The operative portion of the judgment in that case was that six months' notice according to the Bengali calendar was sufficient. Finally, the plaintiff himself could not challenge the validity of the lease, as he was himself a party to it.

SANDERSON C. J. In this case I think the appeal must be dismissed. The lease was given on the 18th of January 1904 to the defendant's brother, one Sheikh Chandu, of a particular area of land which was 2 cottahs, and the rent was Rs. 12 a year. In 1909 Chandu died. From that time the defendant and the heirs of Chandu, and I think all his heirs, lived on the land in question; but apparently after the death of Chandu the land occupied by the defendant and the heirs, who according to the judgments of the lower Appellate Court, were probably living with the defendant, was $2\frac{1}{2}$ cottas and the rent that was paid was not Rs. 12 a year but was Rs. 15 a year, and the first question raised is whether the tenancy was a heritable one.

The learned Subordinate Judge has held that the tenancy was not a heritable one, and he bases his judgment upon the terms of the lease. That has been examined by my learned brother Mr. Justice Mookerjee and he agrees that there is nothing in the lease to show that the tenancy was a heritable one. Further than that, the fact that the area occupied after Chandu's death was different from that included in the lease, and the fact that the rent was different from that which was specified in the lease, lead me to come to the conclusion that the judgment of the learned Subordinate Judge that the holding was not a heritable one, was correct. Therefore the position is this. The lease has

come to an end; a new tenancy must have been created, and upon that two questions arise—with whom was the new tenancy created and, secondly, on what terms?

Now, upon the first point, the learned vakil, who has argued the case for the appellant, urges that the tenants were not only the defendant but also the heirs who were co-sharer tenants, as he suggests, with the defendant. That point is really a question of fact and that has been decided by the learned Subordinate Judge against him, who has held that the defendant was the only tenant, and if it is necessary for me to express any opinion, I think that the learned Judge was right in coming to that conclusion as far as I can judge from the materials before me. It is not necessary for me to go into detail; they are referred to in the two judgments that are before us. Therefore, the tenancy was between the plaintiff and the defendant.

Then the second point arises,—what were the terms of that tenancy? There is no dispute as to that, because the Court of first instance has held that the rent was an annual rent of Rs. 15. The contest had been as to whether the rent was a monthly rent or a yearly rent: the amount was agreed between the parties, and as to that there was no dispute. The question was whether it was an annual rent of Rs. 15 or a monthly rent at Re. 1-4 annas the Court of first instance has dealt with that specific question which is a question of fact and has found that the rent was an annual rent of Rs. 15. Then arises the next question whether from that fact, it can be presumed that the tenancy was an annual tenancy. I should be prepared to follow what was said by my learned brother Mr. Justice Mookerjee in the case *Durgi Nikarini v. Goberdhan Bose* (1), namely, “It may possibly be accepted as a proposition

(1) (1914) 20 C. L. J. 448, 454.

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generally true, that, as indicated in *Wilkinson v. Hall* (1), the mode in which rent is expressed to be reserved affords a presumption that the tenancy is of a character corresponding thereto. The rule, however, is not of universal application, and it was pointed out by Mr. Justice Maule in *Atherstone v. Bostock* (2) that the presumption of yearly taking from the rent being paid yearly does not apply to the case of lodgings, and the same view is supported by the case of *Wilson v. Abbott* (3)". Now, in this case there is nothing to rebut the presumption which I think ought to be drawn from the fact that the rent was to be an annual rent. Therefore, the presumption ought to be drawn that the tenancy was to be an annual tenancy; and, so far that conclusion at which I have arrived, is in favour of the appellant. Therefore, within the words of section 106 of the Transfer of Property Act, there would be a contract, namely, such as I have described, a contract of tenancy between the plaintiff on the one hand and the defendant on the other, and an annual tenancy for which an annual rent of Rs. 15 was to be paid, and, therefore, section 106, if it stood by itself, would not apply because there would be a contract to the contrary. But unfortunately for the appellant, there is section 107 which says that such a contract as that, a contract such as I have described, which reserves a yearly rent, can be made only by a registered instrument, and, inasmuch as there is no registered instrument in this case, that contract must be treated as an invalid contract and as not existing. Therefore, I am forced to the conclusion that this case does come within section 106, because there is an absence of a contract to the contrary, inasmuch as the contract which was in fact made and was in fact

(1) (1837) 3 Bing. N. C. 508.

(2) (1841) 10 L. J. C. P. 114.

(3) (1824) 3 B. & C. 88.

held to exist by the Court of first instance was not put into writing and was not registered. Therefore, there being no contract to the contrary, and inasmuch as this was a lease of immovable property and not for agricultural or manufacturing purposes but for some other purpose, it must be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy: and, inasmuch as fifteen days' notice was admittedly given in this case, a sufficient notice under the statute was given, and the plaintiff consequently is entitled to obtain a decree for possession of the land,-- for arrears of rent and for damages for holding over after the notice to quit

For these reasons the appeal must be dismissed with costs.

MOOKERJEE J. I agree.

O. M.

Appeal dismissed.

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LETTERS PATENT APPEAL.*Before Sanderson C.J. and Mookerjee J.***MAHIM CHANDRA CHOWDHURY***v.***PIYARI LAL DAS.***

1916

May 30.

Sale for Arrears of Revenue—Defaulter—Assam Land Revenue Regulation (I of 1886), ss. 63, 67, 85—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 121, 142.

Where persons are in actual possession of a part of the estate sold for arrears of revenue under the Assam Land and Revenue Regulation, they are defaulters by reason of section 67.

Aftar Ali v. Brojendra Kishore Roy Chowdhury (1) referred to.

A suit for recovery of possession brought within 12 years from the date on which the Collector gave symbolical possession to the purchasers, is within time.

Mozuffer Wahid v. Abdus Samad (2) followed.

Section 63 cannot be construed as restricted to persons who *profess* to hold the land as included in the estate sold for arrears of revenue.

APPEAL under section 15 of the Letters Patent by Mahim Chandra Chowdhury and others, the defendants.

The plaintiffs alleged that the land in suit appertained to taluk No. 12, Shibaram, which was sold for arrears of revenue and purchased by the plaintiff No. 1 on the 7th November 1895. This sale was confirmed on the 22nd November 1895, and delivery of possession was given on 22nd July 1897. Three other persons, viz., Kanta Mohun Roy, Santosh Roy and Kunja Mohun Roy had four annas share in the land jointly

* Letters Patent Appeal No. 98 of 1913 in Appeal from Appellate Decree, No. 1777 of 1911.

(1) (1915) 24 C. L. J. 60.

(2) (1880) 6 C. L. R. 539, 541.

with the plaintiff No. 1. They conveyed that share to the plaintiff No. 2. The plaintiffs further alleged that the defendants were the defaulting proprietors of the land in suit and had been in wrongful possession thereof and had in consequence kept the plaintiffs out of it. The plaintiffs, therefore, instituted the present suit for recovery of possession of the land and for mesne profits for the years 1906 and 1907.

The defendants asserted that they were holding the lands in *shikmi* right under another estate and that the suit was barred by limitation.

By his judgment, dated 31st March 1911, Babu Aswini Kumar Bose, Subordinate Judge of Sylhet, modified the decree of Babu Romesh Chandra Sen, Munsif of Habiganj, dated 15th August 1910.

The lower Appellate Court found that the lands appertained to plaintiffs' estate, that though the defendants were in possession of the lands for more than 12 years even at the time the revenue-sale took place they were to be considered as defaulters under sections 63 and 67 of the Assam Land Revenue Regulation, and as such their title had passed by the revenue sale. Since they were defaulters, limitation was to be computed as against them from the date when the plaintiffs obtained delivery of possession which was within 12 years of the date of institution of the suit.

The defendant No. 10 and the representatives in interest of the defendant No. 5 then preferred a second appeal to the High Court which was dismissed by Sharfuddin J. on 9th July 1913. Thereupon, the said defendants filed a further appeal in the High Court under section 15 of the Letters Patent.

Babu Kumar Sankar Roy, for the appellants. The defendants cannot be treated as defaulters. In sections

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63 and 67 of the Assam Land Revenue Regulation the clause "all persons who have been in possession of the estate or any part of it" means and refers only to persons who *profess* to hold the lands as appertaining to that estate and would not include persons who profess to hold the lands as part of another estate. Section 3 gives an idea of what an estate is. It means lands subject to payment of revenue and therefore section 63 would not include persons in whom there is no obligation to pay revenue in respect of those lands; for, otherwise, section 63 would make all persons even tenants and mortgagees liable as defaulters. Sections 50, 58, 59, 65, 70, 71 and 76 also show that the holder of an incumbrance, such as the present defendants, has no status under that Regulation; for he cannot have his name registered nor can he bring suits for rent, nor open a separate account for the lands held by him. Therefore he should not be made liable under section 63 as a defaulter. Moreover if section 63 includes such cases then the provision for annulling incumbrances under section 71 becomes quite redundant because being defaulters their interest would pass by virtue of section 63. Besides, the position of such a person has always been held to be that of the holder of an incumbrance: *Karmi Khan v. Brojo Nath Das* (1), *Gocool Bagdi v. Debendra Nath Sen* (2), *Mahomed Nasim v. Kasi Nath Ghose* (3).

[MOOKERJEE J. That very point was decided by myself and Richardson J., in *Aftar v. Brojendro* (4)].

In that case, the view that the position of such a person is that of an incumbrancer does not appear from the judgment to have been advanced on behalf of such a person.

[MOOKERJEE J. That very point has been decided

(1) (1894) I. L. R. 22 Cal. 244.

(3) (1898) I. L. R. 26 Cal. 194.

(2) (1911) 14 C. L. J. 136.

(4) (1915) 24 C. L. J. 60.

under the Bengal Revenue Sale Law also: *Bikuntha Nath Rai Chowdhuri v. Basanta Kumari Dasi* (1).]

That case does not say that the position of such a person is not that of an incumbrancer; it only says that if your estate is sold for arrears of revenue and you have acquired by adverse possession an interest over the lands of another estate, the latter will not pass along with your estate when it is sold for arrears of revenue.

[MOOKERJEE J. In *Gocool Bagdi v. Debendra Nath Sen* (2), we did not decide anything, but only summarised the law; and *Mahomed Nasim v. Kasi Nath Ghose* (3) is a case in which the incumbrance set up was one subordinate to the estate.]

In all the earlier cases, no distinction has been made between setting up an independent title and setting up a subordinate title. Your Lordships will, therefore, be pleased not to make it now.

[MOOKERJEE J. But if you set up an independent title and hold all the lands ousting the true owner, what becomes of the Government revenue?]

That is not jeopardised. Government can sell the estate free of all incumbrances at any time, and my position, whether I oust the true owner of a part or the whole of the estate, is always nothing better than that of an incumbrancer.

If I am an incumbrancer, whether this suit falls under Article 142 or 121 of the Limitation Act, it is clearly barred, for it must be brought within 12 years of the date of confirmation of sale (*i.e.*, 8th October 1896). *Vide* sections 86 and 82 of the Assam Land Revenue Regulation.

[MOOKERJEE J. The decision in *Mozuffer Wahid v. Abdus Samad* (4) is a difficulty in your way.]

(1) (1915) 23 C. L. J. 151, 159. (3) (1898) I. L. R. 26 Calc. 194;

(2) (1911) 14 C. L. J. 136.

3 C. W. N. 108.

(4) (1880) 6 C. L. R. 539, 541.

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That was a case between the purchaser and the proprietors of the estate. The present defendants are not so. That decision is based on the Full Bench case *Jogobundhu Mukerjee v. Ram Chander Bysack* (1); and in *Mir Waziruddin v. Lala Deoki Nandan* (2), that decision has been quoted and its underlying principle has been explained to be that limitation must be computed from the date of delivery of possession, only so far as parties to the suit or proceedings are concerned.

[MOOKERJEE J. In revenue sales, there are no parties. The estate is advertised to be sold and is sold.]

But the recorded proprietors are to be taken to be the parties to the proceedings.

I submit that the decision in *Baikuntha Nath Rai Chowdhuri v. Basanta Kumari Dasi* (3) is not against me.

[MOOKERJEE J. It was the converse case.]

No one appeared for the respondents.

SANDERSON C. J. This is a case in which we had the benefit of a very able and learned argument on behalf of the appellants, but I do not think myself that there is very much difficulty in the case: and, further than that, I think it is directly covered by authority. In the Court of first instance, the suit was dismissed. The learned Judge of the first Appellate Court decreed the suit, and Mr. Justice Sharfuddin affirmed that judgment.

The suit was brought for possession of certain land. The plaintiffs bought at a sale held by the Government for arrears of revenue. The material dates were as follows: the sale was on the 7th of September 1895;

(1) (1878) 5 C. L. R. 548.

(2) (1907) 6 C. L. J. 472.

(3) (1915) 23 C. L. J. 151, 159.

the sale was confirmed on the 22nd of November 1895; the certificate was on the 8th of October 1896, and symbolical possession was given to the plaintiffs on the 22nd of July 1897. The suit was brought on the 22nd of July 1909, just within twelve years after the date when symbolical possession was given to the plaintiffs.

Two points arise in this case; the *first* one upon the meaning of section 63 of Regulation 1 of 1886, (the Assam Land and Revenue Regulation 1886); and, *secondly*, whether the plaintiff's claim is barred by the Statute of Limitation. Section 63 says, "Land-revenue payable in respect of any estate shall be due jointly and severally from all persons who have been in possession of the estate or any part of it during any portion of the agricultural year in respect of which that revenue is payable." It has been found as a fact that the land in question was part of the estate which was sold by the Government in respect of the arrears of revenue. But it was alleged by the learned vakil for the appellants that it was held by the defendants as appertaining to another estate and not to the estate which the Government was selling. I ought to have mentioned that the defendants' claim to the title to this land was based upon adverse possession for more than twelve years. Now, as I have said, it has been found that the land in question was part of the estate which had been sold and it cannot be denied that the defendants were also in possession of that part of the estate, and they were in possession of that part of the estate by reason of the adverse possession which they had had for over twelve years. Now, having regard to what was said by the learned vakil in his argument, viz., that if we were to decide this case in favour of the plaintiffs, we should be deciding that the ordinary occupancy tenant could be liable for the revenue, I

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wish to say quite distinctly that I am now deciding this case upon the facts of this case, not intending to cover any other case of different facts. The facts are that the defendants were in possession of the property claiming to be owners thereof by reason of adverse possession for more than twelve years. Now, as I read this section, the intention of the Legislature was that Government or the Revenue Department should not have to go hunting up and down the country for the persons who are liable to pay revenue, and therefore they provided that the revenue should be paid by all persons who have been in possession of the estate or any part of it during any portion of the agricultural year in respect of which that revenue is payable. As I have said it has been found that the property in question was part of the estate which was sold, and it cannot be denied that the defendants were in actual possession. To my mind, the case clearly comes within the meaning of that section, and consequently the defendants became defaulters by reason of section 67 which says, "Land-revenue not paid on the date when it falls due shall be deemed to be an arrear, and every person liable for it shall be deemed to be a defaulter. I do not really think that I should have taken the trouble to express my judgment at such length, except out of deference to the argument of the learned vakil, for I think the case is covered by the decision of my learned brothers, Mr. Justice Mookerjee and Mr. Justice Richardson, in the case of *Aftar Ali v. Brojendra Kishore Roy Chowdhury* which is unreported (1), and which was referred to by my learned brother, Mr. Justice Mookerjee, during the course of the argument, and it is in accordance with the conclusion at which I have arrived. The defendants being *defaulters* within the meaning

(1) (1915) Since reported in 24 C. L. J. 60.

of section 67, their interest in the land which they had acquired by adverse possession was liable to be sold under section 70 of the same Regulation, and that being so, their title and interest passed to the plaintiffs who were purchasers at that sale. That disposes of the first point.

The only other question is whether the suit was brought within the time given by the Statute of Limitation. There again, this matter is covered by authority, provided that the defendants were *defaulters* within the meaning of section 67. That authority is the case of *Mozuffer Wahid v. Abdus Samad* (1). The head-note there, is as follows: "Where land is sold under Act XI of 1859, for arrears of Government Revenue, the purchaser who has been put in symbolical possession by the proclamation of the Collector is entitled to sue for actual possession of the land within twelve years from the date of such symbolical possession." That exactly covers the point in this case. The reason upon which that judgment was based is to be found at the bottom of page 541 where it is said "Under the Act the Collector was directed, in a certain case, to give possession by proclamation. He did in this case, by proclamation on the 3rd August 1864, give possession to the plaintiffs, and on the authority of the case quoted and upon general principles, we are of opinion that the proclamation was an act of possession by the plaintiffs, and that they are entitled to date their suit from the 3rd August 1864, and inasmuch as they instituted their suit on the 17th July 1876, they are in time." Substituting the dates in this case for the dates which are given in the decision which I have just read, that is an authority directly in point, and I intend to follow

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that authority and to hold that as long as the suit was brought within twelve years from the date upon which the Collector gave symbolical possession to the plaintiffs, the suit is brought within time. Inasmuch as it is not disputed that it was on the 22nd July 1897 that the plaintiffs got symbolical possession and the suit was brought by them on the 22nd of July 1899. Just within the twelve years, I think the suit was in time.

For these reasons I think that the appeal should be dismissed, but without costs, no one appearing for the respondent.

MOOKERJEE J. I agree that the decree awarded to the plaintiff by the Subordinate Judge, which has been affirmed by Mr. Justice Sharfuddin, cannot be successfully assailed.

The plaintiffs seek to recover possession of the disputed land, on the strength of title by purchase at a sale for arrears of revenue held on the 7th September 1895 under section 70 of the Assam Land and Revenue Regulation, 1886. Under section 80, the sale became final on the 5th November 1895, though it was not confirmed till the 22nd November 1895. The sale certificate was granted on the 8th October 1896 and possession was delivered to the purchaser under section 85 on the 22nd July 1897. On the 22nd July 1909, the plaintiffs instituted this suit to recover possession of the land from the defendants on the allegation that it was comprised in Taluk Sibram purchased by them on the 7th September 1895. The defendants resisted the claim on the ground that the land was comprised in their taluks Durga Ram and Adamraja and had been in their occupation from a time long anterior to the revenue sale of taluk Sibram which was the root of the title of the plaintiffs.

They also pleaded that the suit was barred by limitation. The Court of first instance dismissed the suit. Upon appeal the Subordinate Judge decreed the suit in part, that is, in respect of lands found to have been included in Taluk Sibram ; and his decree has been affirmed by Mr. Justice Sharfuddin.

On the present appeal, the defendants have contended that the suit is barred by limitation under Article 121 of the Schedule to the Limitation Act, inasmuch as they had been in adverse possession of the decreed lands for the statutory period, on the assertion that the lands were included in their property. Article 121 provides " that a suit to avoid an encumbrance on an entire estate sold for arrears of Government revenue must be instituted within 12 years from the date when the sale became final and conclusive." The contention of the appellants in substance is that as the sale became final and conclusive on the 5th November 1895, the present suit instituted on the 22nd July 1909, is barred by limitation. This raises the question of the status of the defendants and the effect of the revenue sale on their rights. Mr. Justice Sharfuddin, in concurrence with the Subordinate Judge, has held that the effect of the adverse possession of the defendants, which had lasted for a period of more than 12 years before the date of the revenue sale, was to constitute them joint proprietors of taluk Sibram ; they were consequently in the position of defaulting proprietors whose interest was swept away by the revenue sale. This conclusion has been controverted by the appellants who have argued that by adverse possession they had acquired the status merely of encumbrancers whose interest could be annulled only within 12 years from the date when the sale became final. In support of this contention, reliance has been placed upon the case of *Gecool Bagdi*

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v. *Debendra Nath Sen* (1), where the meaning of the term "incumbrance" as used in various statutes, more or less analogous to the Assam Land and Revenue Regulation, 1886, was discussed, as also to the decision in *Mahomed Nasim v. Kasi Nath Ghose* (2), where the effect of a sale for arrears of revenue under the Regulation was considered. In my opinion, the contention of the appellants is not well-founded. The effect of the adverse possession of the defendants was, under section 28 of the Limitation Act, to extinguish the interest of the proprietors of taluk Sibram in the disputed land upon the expiry of the statutory period. The defendants thus acquired the proprietary interest in taluk Sibram with regard to the disputed land, although they professed to hold the land as an integral part of their property : *Gossain Dass Chunder v. Issur Chunder Dutt* (3), *Jagrani Bibi v. Ganeshi* (4). In this view, the defendants were persons in possession of taluk Sibram and were jointly liable to pay the Government revenue therefor. This follows from a plain reading of section 63, which provides that "land revenue payable in respect of any estate, shall be due jointly and severally from all persons who have been in possession of the estate or any part of it during any portion of the agricultural year in respect of which that revenue is payable." We are invited to place a narrow construction upon this section and to restrict its application to cases where the person in possession professes to hold the land as included in that estate. But I cannot read into section 63, words not to be found there, and I am not prepared to adopt the narrow construction put forward by the appellants. The result would be obviously anomalous, if

(1) (1911) 14 C. L. J. 136.

(3) (1887) I. L. R. 3 Calc. 224.

(2) (1898) I. L. R. 26 Calc. 194 ;

(4) (1881) I. L. R. 3 All. 495.

3 C. W. N. 108.

that interpretation were accepted in the case where a proprietor of an estate might be dispossessed of all the lands of the estate; the consequence would be that though a person might be in adverse possession of the entire estate and might, by lapse of time, acquire a proprietary interest in that estate, yet he would not be liable for payment of Government revenue. This unquestionably would not be consistent with the rules of justice, equity and good conscience. If we next turn to section 67, we find that land-revenue not paid on the date when it falls due shall be deemed to be an arrear, and every person liable for it shall be deemed to be a defaulter. Consequently, the effect of the adverse possession of the defendants was to constitute them joint proprietors of taluk Sibram. It follows as a necessary corollary that with the acquisition of that right, they also incurred the corresponding liability, namely, to pay Government revenue. This is the view which has been adopted by this Court in the case of *Aftar Ali v. Brojendra Kishore Rai Chowdhuri* (1) and *Jitendra Kumar Pal Chaudhuri v. Mahendra Chandra Sarma* (2). It may be added that a similar view had been previously adopted with regard to the Bengal Revenue Sale Law (Act XI of 1859) in the cases of *Kumar Kalanand Singh v. Syed Sarafat Hossein* (3), *Rhimuddi Munshi v. Nalini Kanta Lahiri* (4), and *Baikuntha Nath Rai Choudhuri v. Basanta Kumari Dasi* (5). The case of *Mahomed Nasim v. Kasi Nath Ghose* (6) is plainly distinguishable. That case is an authority only for the proposition that the interest, acquired by a subordinate tenure-holder in respect of lands not comprised in his tenure but annexed thereto by encroachment, is that of an encumbrancer; but

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(1) (1915) 24 C. L. J. 60.

(2) (1914) 24 C. L. J. 62.

(3) (1908) 12 C. W. N. 528.

(4) (1909) 13 C. W. N. 407.

(5) (1915) 23 C. L. J. 151, 159.

(6) (1898) I. L. R. 26 Calc. 194.

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it would be clearly inappropriate to describe as an incumbrancer a person who has acquired the status of a proprietor of an estate. I hold accordingly that the defendants were joint proprietors of the taluk purchased by the plaintiffs, that they were defaulters, and that they held no incumbrance which the plaintiffs were called upon to annul by the institution of a suit within the period prescribed by Article 121.

The question next arises, by what Article of the Limitation Act is the suit governed? It is plain that the rule applicable is embodied in Article 142. Possession was delivered to the purchaser on the 22nd July 1897; as the defendants did not quit the land, they must be deemed to have dispossessed the plaintiffs on that date, so that time ran against the respondents from then and not earlier. This view is supported by the decision in *Mozuffer Wahid v. Abdus Samad* (1) which was decided in 1880 and has been accepted as good law ever since; *Mir Waziruddin v. Lala Deoki Nandan* (2). I am not prepared at this distance of time to question its correctness or treat the matter as *res integra*. It is plain that the question of limitation is concluded by authority, while the question of title is concluded by the concurrent findings of the lower Courts. The appeal must consequently be dismissed.

G. S.

Appeal dismissed.

(1) (1880) 6 C. L. R. 539, 541.

(2) (1907) 6 C. L. J. 472.

LETTERS PATENT APPEAL.

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Adverse Possession—Simple Mortgage—Adverse possession, against mortgagor, whether adverse against mortgagee in case of simple mortgage—Limitation—Limitation Act (IX of 1908) s. 28, Sch. I, Art. 14¹.

Adverse possession against the mortgagor is not *per se* adverse also against the mortgagee in the case of a simple mortgage.

Per SANDERSON C.J. Adverse possession affects the interest which the person, who was entitled to immediate possession, had at that time.

Per MOOKERJEE J. Section 28 of the Limitation Act clearly contemplates that the person, whose right is extinguished by lapse of time is a person entitled to institute a suit for possession of the property.

Karan Singh v. Bakar Ali Khan (1) and *Prannath Ray Chowdhury v. Rookea Begum* (2) distinguished.

Aimadar Mandal v. Mukhan Lal Day (3) and *Parthasarathy Naicken v. Laksmana Naicker* (4) referred to.

Nullamuttu v. Betha Naicken (5) dissented from.

APPEAL under section 15 of the Letters Patent by Priya Sakhi Debi, plaintiff.

The plaintiff brought this suit on the basis of a simple mortgage executed in her favour by the defendants Nos. 1 and 2 on the 27th June 1887. The defendant

* Letters Patent Appeal, No. 33 of 1915, in Appeal from Appellate Decree No 876 of 1913.

(1) (1882) I. L. R. 5 All. 1 ;
L. R. 9 I. A. 99.

(4) (1911) I. L. R. 35 Mad. 231 ;
21 Mad. L. J. 467.

(2) (1859) 7 Moo. I. A. 323.

(5) (1899) I. L. R. 23 Mad. 37.

(3) (1906) I. L. R. 33 Calc. 1015 ;
10 C. W. N. 911.

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No. 3 was the purchaser of one of the properties described as property No. 1 covered by the bond. The suit was decreed against all the defendants and this decision was affirmed on appeal. But on 23rd March 1910, Brett and Sharfuddin JJ. on second appeal remanded the case for a decision of the question of adverse possession raised by defendant No. 3 with regard to plot No. 1. His case was that this plot No. 1 originally belonged to one Abhoy Charan Mullik and others and that it was sold with other plots to the defendants Nos. 1 and 2 on 16th February 1874 by an unregistered *kobala*. The Mulliks, however, remained in possession and mortgaged plot No. 1 and other plots with the defendant No. 3 on the 7th May 1875 under a registered mortgage deed. On the 6th February 1881, the defendant No. 3 obtained a decree on his mortgage, and on the 7th December 1891 plot No. 1 was sold and purchased by him and was subsequently all along in his possession. The present suit was not brought till the 22nd August 1905. After remand the Court of first instance found on the question of adverse possession against the plaintiff, but this decision was reversed on appeal. Fletcher J., on second appeal, set aside the judgment and decree of the lower Appellate Court, holding that adverse possession against the mortgagor is adverse also against the mortgagee even in the case of a simple mortgage. The plaintiff, thereupon, preferred this further appeal under section 15 of the Letters Patent.

Babu Mahendra Nath Roy and Babu Bipin Behary Ghose, for the appellant. Plaintiff is the appellant. The appeal is in regard to plot No. 1 claimed by defendant No. 3 to which he has obtained title by adverse possession against the mortgagor. The question is whether this will operate as adverse

possession against the mortgagee. Mr. Justice Fletcher has held that adverse possession against mortgagor is adverse also against mortgagee even in the case of a simple mortgage. But the Privy Council has not held this proposition. In the mortgagor is left only the equity of redemption and it may be gone or even assigned but that does not affect the mortgage : *Ramasami Chetti v. Ponna Padayachi* (1). *Parthasarathy Naicken v. Lakshmana Naicker* (2) comments upon all the earlier cases and *Karan Singh v. Bakar Ali Khan* (3). This case, I submit, has no bearing. The right of a mortgagee who can safeguard his possession by immediately recovering possession is quite different from that of a simple mortgagee who has no possession. The suit is to be brought within 12 years [Sch. I, Art. 132 of the Limitation Act]. In *Karan Singh v. Bakar Ali Khan* (3), I submit the only question decided was one of fact ; and therefore in *Aimadar Mandal v. Makhani Lal Day* (4) Maclean C. J. held that *Karan Singh's Case* (3) had no bearing, and I submit it has none on the present suit. There is a conflict between this Court and the other Courts, but not in this Court so as to necessitate a reference to a Full Bench : *Ram Coomar v. Prosunno* (5), *Periyar v. Shunmugasundaram* (6) and *Raj Nath v. Narain Das* (7). Where mortgagor's possession is disturbed and mortgagee has the right to recover possession and does not do so, the adverse possession will be against mortgagee also. Even if mortgagee at once enforces this security, he cannot recover possession.

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(1) (1910) I. L. R. 36 Mad. 97 ;
21 Mad. L. J. 397.

(2) (1911) I. L. R. 35 Mad. 231 ;
21 Mad. L. J. 467.

(3) (1882) I. L. R. 5 All. 1 ;
L. R. 9 I. A. 99.

(4) (1906) I. L. R. 33 Cal. 1015 ;
10 C. W. N. 904.

(5) (1864) W. R. 375.

(6) (1913) I. L. R. 38 Mad. 903.

(7) (1914) I. L. R. 36 All. 567, 571.

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The test is whether or not the mortgagee, when his mortgagor is dispossessed, has the right to interfere against trespasser; the mere right that he can enforce his security earlier would not have the effect of turning out the trespasser, but would only amount to a money decree.

[SANDERSON C J. The question then is, can the person who gets his title by adverse possession get a higher title than he could have by conveyance?]

No. In *Nanda Kumar v. Ajodhya* (1), Mr. Justice Mookerjee collects all the decisions citing English and American cases. Refers to *Raj Nath v. Narain* (2) a decision of Richards C. J. It has been held that Art. 132 applies to a suit on a simple mortgage to "recover money charged upon immoveable property."

[MOOKERJEE J. It is really not a question of limitation but a question of title in the garb of limitation.]

Section 85 of the Transfer of Property Act probably applied when the suit was brought, though now O. XXXIV, r. 1 of the new Code of Civil Procedure governs such suits. *Ramasami Chetti v. Ponna Padryachi* (3) has been dissented from in *Parthasarathy Naicken v. Lakshmana Naicker* (4) at page 236, where the earlier cases are referred to and dissented from. I say there is no charge upon the property so far as I am concerned.

Babu Ram Chandra Mazumdar and *Babu Sarat Kumar Mitra*, for the respondent. States the facts of *Karan Singh's* case (5). The Judicial Committee of the Privy Council has made clear the law that is applicable to the facts.

[MOOKERJEE J. We cannot hold that a point was

(1) (1911) 14 C. L. J. 292 298.

(4) (1911) I. L. R. 35 Mad. 231 ;

(2) (1914) I. L. R. 36 All. 567, 571.

21 Mad. L. J. 467.

(3) (1910) I. L. R. 36 Mad. 97 ;

(5) (1882) I. L. R. 5 All. 1, 5;

21 Mad. L. J. 397.

L. R. 9 I. A. 99.

decided by implication by the Privy Council, when as a matter of fact the point did not arise.]

Refers to *Prannath Ray Chowdhry v. Rookea Begum* (1).

[MOOKERJEE J. Section 28 is the only section of the statute that refers to extinction of right to property.]

The mortgagee has only an interest in immoveable property viz., right to realise his money from the property, but no right to possession. We don't derive any title from the mortgagor, and say there was no charge enforceable against us.

[MOOKERJEE J. How does it affect the mortgagee, even if you have acquired a title against the mortgagor?]

If I prescribe for a limited interest, I won't get more, *e.g.*, a tenant is in possession of a holding and encroaches upon the neighbouring portion of land: he may say "I hold the encroached land as against the landlord" or he may say "I hold it as part of my tenancy." If the mortgagee wants to enforce his right as against a trespasser he must do so within a prescribed period of limitation.

The mortgagee could have enforced his rights even before the money became due. *Vide Periya v. Shunmugasundaram* (2) also *Kanhoo Lal v. Manki Bibi* (3). In *Nanda Kumar v. Ajodhya* (4) there is a summary of my arguments so beautifully made: See also *Jaggewar v. Bhuban Mohan Mitra* (5). The purchase by landlord was subject to the mortgage and provisions of section 167 of the Bengal Tenancy Act were not complied with, and therefore no question of limitation arises: *Ramasami Chetti v. Ponna Padayachi* (6).

(1) (1857) 7 Moo. I. A. 323, 335.

(4) (1911) 14 C. L. J. 292.

(2) (1913) I. L. R. 38 Mad. 903.

(5) (1906) I. L. R. 33 Cal. 425 ;

(3) (1902) 6 C. W. N. 601.

3 C. L. J. 205.

(6) (1910) I. L. R. 36 Mad. 97 ; 21 Mad. L. J. 397.

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Babu Bipin Behari Ghose, in reply. *Nandan Singh v. Jumman* (1) is referred to in the Full Bench case. It is very dangerous to argue from an inference. *Parthasarathy Naicken v. Lakshmana Naicker* (2) ought to be followed as it is a later case in which all the previous cases have been discussed. In *Periya v. Shunmugasundaram* (3), it is pointed out that the onus is on the trespasser to prove not only that he asserted a right adverse to mortgagor but that the mortgagor also knew it.

Cur. adv. vult.

SANDERSON C. J. This is an appeal by the plaintiff from the judgment of Mr. Justice Fletcher whereby he set aside the judgment and decree of the Subordinate Judge of Burdwan.

The action was brought to enforce a mortgage bond dated the 27th June 1887, executed in favour of the plaintiff by the original defendants Nos. 1 and 2. Under the bond the principal was to be paid by instalments and it was provided that the whole amount remaining unpaid should become payable upon default in payment of any one of the instalments with interest at 2 per cent. per mensem. One of the instalments was not paid on 11th February 1893: there was, however, a payment of interest on 18th October 1893 and the suit was brought on the 22nd August 1905.

The dispute in this case relates to certain land which has been described as Plot No. 1. It appears that on 16th February 1874, this plot of land was sold by the then owners, called the Mullicks, to the predecessor in-title of defendants Nos. 1 and 2, and that these defendants and their predecessors were in possession of the plot from that date until 1892.

(1) (1912) I. L. R. 34 All. 640; (2) (1911) I. L. R. 35 Mad. 231;
10 All. L. J. 278. 21 Mad. L. J. 467.

(3) (1913) I. L. R. 38 Mad. 903.

On the 7th May 1875, the Mullicks, although they had already sold the plot, purported to execute a mortgage of the said land in favour of defendant No. 3. On the 27th June 1887, the defendants Nos. 1 and 2 (as already stated) mortgaged the plot to the plaintiff.

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The defendant No. 3 brought a suit on his mortgage and on the 6th February 1891 he obtained a decree. On the 7th December 1891, at an auction held in execution of the said decree, the defendant No. 3 purchased the said land and in 1892 obtained possession thereof and from that time up to the institution of this suit, on 22nd August 1905, he remained in possession.

The defendant No. 3 having been made a party to this suit set up the defence that he had been in adverse possession of the said land for more than 12 years before the institution of this suit.

The case having come up on appeal, two learned Judges of the High Court in a judgment of 23rd March 1910 remanded it for the decision of this question as far as defendant No. 3 was concerned and whether the plaintiff was entitled to bring the said plot to sale as against defendant No. 3.

The Court of first instance decided against the plaintiff; the Subordinate Judge, however, held that the plaintiff was not made a party to the mortgage suit brought by the defendant No. 3 and consequently she was not bound by it. Further, that if defendants Nos. 1 and 2, after executing the mortgage in favour of the plaintiff, had entered into any compromise with defendant No. 3 by which they relinquished their right to the said plot (upon which he came to no definite conclusion as to the facts), the plaintiff could not be bound thereby as she was no party to that proceeding; and, finally, that the possession of defendant No. 3 could not be held to be adverse to the plaintiff before

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the time when she could enforce the mortgage and therefore the learned Judge decided in favour of the plaintiff.

The learned Judge, Mr. Justice Fletcher, held that the possession of the defendant No. 3 was adverse to the plaintiff and consequently he reversed the judgment of the Subordinate Judge and decided in favour of defendant No. 3.

The mortgage was a simple mortgage and it is to be noted that this suit was merely one for the realisation of the plaintiff's security, the plaintiff asked for a decree for the principal and interest due and a sale of the mortgaged property.

It was held by the Subordinate Judge when the case was first before the 1st Appellate Court in his judgment of 4th May 1907 that the suit was not barred, for although there had been default in the payment of an instalment in February 1893, there had been a payment of interest on the 18th October 1893 and that consequently under section 20 of the Limitation Act a fresh period of limitation should be computed from the time when the interest was paid and that the suit being instituted on 22nd August 1905 was therefore in time.

This finding so far as defendants Nos. 1 and 2 were concerned was affirmed by the High Court on 23rd March 1910.

The matter, therefore, in this appeal is between the plaintiff and defendant No. 3 for whom it was argued that the possession of defendant No. 3 was adverse to the mortgagors, defendants Nos. 1 and 2 and it must, therefore, be taken as adverse to the plaintiff the mortgagee and no decree for sale of the property should be made.

It was argued on behalf of the respondent (defendant No. 3) that this question between plaintiff and

defendant No. 3 must be treated as if it were a claim by the plaintiff for possession of immoveable property against defendant No. 3, and that Article 144 of the Limitation Act was applicable, that defendant's possession became adverse to the plaintiff in 1892 and as the suit was not brought until 22nd August 1905, the plaintiff's claim against defendant No. 3 is barred.

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Assuming that this Article is applicable to this suit, the question remains, when did the possession of defendant No. 3 become adverse to the plaintiff?

In my judgment, the term "adverse possession" implies that the person against whom adverse possession is exercised, is a person who is entitled to demand possession at the moment adverse possession begins.

The mortgage in this case being a simple mortgage, the mortgagee was not entitled to demand possession of the property at the time the defendant No. 3 went into possession in 1892, and indeed the plaintiff has never yet become so entitled. Consequently, in my judgment, Article 144, even if applicable, will not avail the defendant No. 3 to dispute the plaintiff's claim.

In my judgment, the principle upon which this matter should be decided is that adverse possession affects the interest, and the interest only, which the person who was entitled to immediate possession had at that time, or in other words, only the interest which the person, having the right to immediate possession, has in the property, when the adverse possession begins can be affected by such adverse possession.

In this case the mortgage in favour of the plaintiff was created before the defendant No. 3 purchased the property at auction and obtained possession thereof in 1892. The position of the plaintiff, the mortgagee, then was that he had an interest in the property with

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a right to bring it to sale for the realisation of the mortgage debt, but with no right to take possession of the property. When, therefore, the defendant took possession of the property after the mortgage to the plaintiff, he took possession only of what belonged to the mortgagor, viz., his equity of redemption, and in my judgment held it subject to the liability of its being sold for the satisfaction of the mortgage debt.

This conclusion is in accordance with the decision of this Court in *Aimad or Mandal v. Makhan Lal Day* (1), and the judgment of the Madras High Court in *Parthasarathy Naicken v. Lakshmana Naicker* (2).

This last mentioned case though reported in 35 Mad. was later in date than *Ramasami Chetti v. Ponna Padayachi* (3), which was one of the cases relied on by the learned Judge and which has now been overruled by a Full Bench in *Vyapuri v. Sonamma* (4).

Karan Singh v. Bakar Ali Khan (5), which was considered by the learned Chief Justice in *Aimadar Mandal v. Makhan Lal Day* (1), in my judgment, is not inconsistent therewith or with the principle above stated: for, in that case, if the defendant's contention had been maintained and he had been allowed to tack on to his own possession the possession of the Collector, and treat that as possession on his own behalf and adverse, then his possession would have begun before the mortgage, and in such case the operation of the adverse possession would not have been affected by the subsequent grant of the mortgage security.

(1) (1906) I. L. R. 33 Calc. 1015 ; (3) (1910) I. L. R. 36 Mad. 97 ;
10 C. W. N. 904. 21 Mad. L. J. 397.

(2) (1911) I. L. R. 35 Mad. 231 ; (4) (1915) 29 Mad. L. J. 645.
21 Mad. L. J. 467.

(5) (1882) I. L. R. 5 All. 1 ;
L. R. 9 I. A. 99.

It was necessary, therefore, for the Privy Council to consider the question of tacking, and their Lordships did not decide that the possession of the defendant standing by itself should be considered adverse to the plaintiff.

Nor do I think that the decision in the case of *Prannath Roy Chowdhry v. Rookea Begum* (1), another of the cases relied on for the respondent, covers the case now under consideration. For these reasons, the appeal, in my judgment, should be allowed with the costs of both hearings in the High Court, and the judgment of the learned Judge of the High Court should be set aside and the decree of the learned Subordinate Judge should be restored.

MOOKERJEE J. I am of opinion that the judgment of Mr. Justice Fletcher can not be supported.

The plaintiff seeks to enforce a mortgage security granted to her by the first defendant on the 27th June 1887. The mortgage provided that, on default of payment of specified instalments, the entire mortgage money would become repayable with interest. As the result of such default, the mortgage money became recoverable on the 11th February 1893. Thereafter, interest was paid by the mortgagors on the 18th October 1893. The present suit was instituted on the 22nd August 1905. The claim was resisted by the third defendant, who had been joined as a party, because the plaintiff found him in possession of one of the properties comprised in the mortgage security. His contention in substance was that the mortgage had ceased to be operative upon the property in his hands. The trial Court decreed the claim in full, and this decision was affirmed by the Subordinate Judge on appeal. On a second appeal to this Court, the suit

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was remanded to the Court of first instance for retrial. That Court dismissed the suit in respect of the property held by the third defendant. This decision was reversed by the Subordinate Judge on appeal. Mr. Justice Fletcher next set aside the decision of the Subordinate Judge and restored the decree of the primary Court. The plaintiff has preferred this appeal against the judgment of Mr. Justice Fletcher under clause 15 of the Letters Patent, and the question for determination is, whether what has been called the first property claimed by the third defendant is liable for the satisfaction of the mortgage debt. The circumstances under which that defendant claims title to the property may be briefly narrated. The property belonged originally to a family of Mulliks who sold it to Chaudhuries (the mortgagors of the plaintiff) on the 16th February 1874. Notwithstanding this sale, the Mulliks mortgaged the property to the Samantas (now represented by the third defendant) on the 7th May 1875. The Samantas sued in 1890 to enforce their security, obtained a decree for sale on the 6th February 1891, and in due course, purchased the mortgaged property in execution on the 7th December 1891. In 1892, the third defendant as purchaser obtained delivery through Court, and dispossessed the first two defendants (the Chaudhuries) who had meanwhile, on the 27th June 1887, granted the simple mortgage in suit. The case for the third defendant is that his adverse possession of the property from 1892 had by 1904 extinguished the title of all persons interested therein whether as mortgagor or as mortgagee, and that, consequently, at the date of the institution of the present suit on the 22nd August 1905, there was no subsisting charge on the property in his hands. Mr. Justice Fletcher has given effect to this contention.

It is desirable to observe at the outset that the defence raised by the third defendant is not a question of the rule of limitation applicable to the suit. The suit is obviously in time under Art. 132 of the Indian Limitation Act, read with section 20: it is a suit to enforce payment of money charged upon immovable property and it has been instituted within 12 years from the date when interest was paid on the sum due. The question raised is in essence one of title; the substance of the defence is that the third defendant has, by adverse possession for the statutory period, acquired a title paramount to that of both the mortgagor and mortgagee. On principle, such a question should not have been litigated in a mortgage suit. The proper scope of a mortgage suit is to cut off the equity of redemption and to bar the rights of the mortgagor and of those claiming under him; the only proper parties to such a suit are the mortgagor and the mortgagee and those who have acquired interest under them subsequent to the mortgage: *Jiggeswar v. Bhuban Mohan Mitra* (1), *Bhaja Chowdhury v. Chuni Lal Marwari* (2). Consequently, the third defendant should have been discharged from this suit when he claimed a title adverse to that of both the mortgagor and the mortgagee. The parties, however, have deliberately adopted a different course, and the question in controversy has been raised and decided; both parties have in this Court expressed a desire that the matter in difference should be settled in this litigation which has now lasted for over ten years. In these circumstances and in view of the qualifications to the general rule explained in the judgment in *Bhaja Chowdhury v. Chuni Lal* (2), it is competent to this Court to determine, whether the third defendant

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(1) (1906) I. L. R. 33 Calc. 425; (2) (1906) 5 C. L. J. 95.
3 C. L. J. 205.

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holds the property free of the mortgage, in other words, whether the right of the mortgagee to appropriate the property to the satisfaction of his debt no longer exists. As there has been much divergence of judicial opinion on this topic, it is desirable to investigate it in the first instance as a question of principle apart from authorities.

Section 58 of the Transfer of Property Act defines a mortgage as the transfer of an interest in specific immovable property. Consequently, when the owner of a property executes a simple mortgage thereof, the entire interest originally vested in him is thereafter vested partly in him as the mortgagor and partly in the mortgagee. A simple mortgagee as such is not entitled under the Transfer of Property Act to take possession of the mortgaged premises; he holds the property as security for the loan while the mortgagor continues in possession thereof: *Papamma Rao v. Vira Pratapa* (1). If, then, after the grant of the simple mortgage, the mortgagor is dispossessed, what is the effect of the possession of the adverse holder, upon the title, first, of the mortgagor, and secondly of the mortgagee? The answer depends obviously upon the true construction of section 28 of the Indian Limitation Act, which is in these terms: "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." It is plain that this section which prescribes a rule for extinguishment of right to property is expressly limited to suits for possession: it has accordingly been held that in respect of debts the provisions of the Limitation Act merely bar the remedy but do not extinguish the right: *Nursing Doyal v. Hurryhur Saha* (2),

(1) (1896) I. L. R. 19 Mad. 249, 252; (2) (1880) I. L. R. 5 Cal. 897.

L. R. 23 I. A. 32.

Mohesh Lal v. Busunt Kumaree (1). Consequently, when the mortgagor in possession is dispossessed, he must, under Article 142, institute a suit for recovery of possession against the trespasser within twelve years from the date of dispossession; if he does not institute such a suit, his right to the property is extinguished. But what is his right to the property? clearly, the equity of redemption which is all that remains in him after he has executed the simple mortgage and which is all that he had when the adverse possession commenced against him. From this it follows that after the lapse of the statutory period for the institution of a suit for possession, his equity of redemption, and *primâ facie* nothing more, becomes vested in the adverse possessor, for as pointed out in *Gossain Dass Chunder v. Issur Chunder Nath* (2), *Jagrani Bibi v. Ganeshi* (3) and *Nanda Kumar v. Ajodhya* (4), the practical effect of section 28, when a person suffers his right to be barred by the law of limitation, is the extinction of his title in favour of the party in possession. The question next arises, what is the effect, if any, on the title of the simple mortgagee, produced by the dispossession of the mortgagor? Does section 28 extinguish his interest? Obviously, the answer is in the negative. The simple mortgagee is not competent to institute a suit for possession of the property, because admittedly he is not entitled to possession either under the statute or under the contract. Section 28 clearly contemplates that the person whose right is extinguished by lapse of time is a person entitled to institute a suit for possession of the property. Consequently, the dispossession of the mortgagor does not extinguish the title of the mortgagee by lapse of time under section 28 of the

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(1) (1880) I. L. R. 6 Calc. 340.

(3) (1881) I. L. R. 3 All. 435.

(2) (1877) I. L. R. 3 Calc. 224.

(4) (1891) 14 C. L. J. 292.

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Indian Limitation Act, and our attention has not been invited to any other statutory provision which is applicable to the present case and which operates to extinguish interests in land. The true effect of a statute of limitation is lucidly stated by Angell: "The principle on which the statute of limitation is predicated is not that the party in whose favour it is invoked, has set up an adverse claim for the period specified, but that such adverse claim is accompanied by such invasion of the rights of the opposite party as to give him a cause of action, which having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered. A mere claim of title unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted and consequently his rights are unaffected by statute" (Angell on Limitation, page 398). The question of the extinction of an incorporeal right by adverse possession thus presents considerable difficulties [*Lakshi Narayan Aiyer v. Ulugammal* (1)], and I am not prepared to accept the view indicated by Subramaniya Iyer, J., in *Nallamuttu v. Betha Naickan* (2), where, however, the adverse possession had commenced before the date of the mortgage. The broad proposition that a hypothecation right is liable to be affected not only by lapse of time as between the creditor and the debtor, but also by possession of the hypothecated property held for the required period by a third person on a claim inconsistent with the rights of both the creditor and the debtor, was sought to be supported from the following passage of the Code (c. 7, 36, 1): "Long standing silence, supported by regular limitation, renders nugatory the action for creditors taking proceedings for their pledge, unless the debtors, or those who have entered into their rights, command

(1) (1914) 28 Mad. L. J. 256.

(2) (1899) I. L. R. 23 Mad. 37.

possession of the security" (Salkowski's Roman Law tr. Whitfield, 503; Mackeldy's Roman Law, tr. Dropsie, 287). But it must be remembered that in later Roman Law, in the case of *pignus* as in that of *hypotheca*, the mortgagee was entitled to possession of the mortgaged property, in the former at the time of the transaction, in the latter when the debt became due (Salkowski 485, Mackeldy 285, Hunter 436, 447). This, however, is not the position of a simple mortgagee under the Transfer of Property Act: *Papamma v. Ram Chandra Razu* (1). On principle, accordingly it is fairly plain that where a simple mortgage has been executed by a person in possession, the subsequent dispossession of the mortgagor, though it may operate by lapse of time, under section 28, to extinguish the equity of redemption in favour of the adverse possessor, does not affect the interest of the mortgagee who is not entitled to possession of the mortgaged premises either under the statute or under the contract. This is substantially the view taken in *Aimadar Mandal v. Makhan Lal Day* (2). Mr. Justice Fletcher, however, has declined to follow the rule laid down in that decision, on the ground that it is inconsistent with two decisions of the Judicial Committee, namely, *Prannath v. Rookea* (3) and *Karan Singh v. Bakar Ali* (4). The respondent has endeavoured to support the decision of Mr Justice Fletcher by a three-fold argument, namely, *first*, that the rule laid down in *Aimadar v. Makhan Lal* (2), is inconsistent with the decisions of the Judicial Committee just mentioned and cannot consequently be treated as good law; *secondly*, that it is in conflict

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(1) (1896) I. L. R. 19 Mad. 249, 252; (3) (1859) 7 Moo. I. A. 323, 355.

L. R. 23 I. A. 32.

(4) (1882) I. L. R. 5 All 1;

(2) (1906) I. L. R. 33 Calc. 1015;

L. R. 9 I. A. 99.

10 C. W. N. 904.

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with the earlier decision of this Court in *Ram Coomar v. Prosunno* (1) and consequently a reference to a Full Bench is unavoidable under the Rules of Court; and, *thirdly*, that there is weighty judicial opinion in support of this view, for instance *Ramasami v. Ponna* (2). In my opinion, these contentions cannot prevail.

As regards the first branch of the contention, I am of opinion that neither of the two decisions of the Judicial Committee supports the contention of the respondent. In *Prannath v. Rookea* (3), the plaintiff, a mortgagee by a conditional sale, had obtained a foreclosure order in proceedings instituted under Reg. XVII of 1806. He then sued to recover possession of the properties as owner from the defendant who claimed under a purchase from the mortgagor which was neither proved nor admitted. The question was raised, whether the plaintiff had validly foreclosed the mortgage by conditional sale so as to entitle him to bring ejectment as owner, as the proceedings for foreclosure were taken more than 12 years after the due date for the repayment of the mortgage money. The law of limitation then in force was contained in section 14, Regulation III of 1793, whereby a suit was barred when the cause of action had arisen 12 years before any suit was commenced on account of it. Lord Kingsdown pointed out that a suit for foreclosure against the mortgagor or against persons claiming privity with the mortgagor might not be barred, while a suit for possession against a stranger who claimed to hold the property free of any mortgage might be barred; but he did not say that the mortgagee's right might be barred by the possession of an

(1) (1864) W. R. 365,

(3) (1859) 7 Moo. I. A. 323, 355.

(2) (1910) I. L. R. 36 Mad. 97;

21 Mad. L. J. 397.

adverse claimant even if the mortgagee's right to possession had not accrued or where the mortgagee was not entitled to possession at all. It was not necessary to make such a pronouncement, because it was found that the possession of the claimant had been originally not adverse to but consistent with the mortgage title, and there was nothing whatever to show that it became adverse at any time before 12 years preceding the institution of the foreclosure suit. On the other hand, there are passages in the judgment of James, L.J., in *Anunda Moyee v. Dhanendra* (1) and in *Brajanath v. Khelut Chunder* (2) which indicate that adverse possession operates against a mortgagee only when the mortgagee is entitled to possession, and time runs against him from the date when he is entitled to enter upon the land. The case of *Karan Singh v. Bakar Ali Khan* (3) also does not support the contention of the respondent. There the Collector had, for protection of the Government revenue, taken possession of the property in 1861, pending the settlement of disputes between rival claimants. The mortgages were executed in 1862 on behalf of one set of claimants, namely, the daughter's sons of the last male owner. In 1863, by an award of arbitrators, the title of the defendant, who was the brother's grandson of the late owner, was established against the daughter's sons. The mortgagee was not a party to these proceedings and was not bound thereby. The Collector then made over possession of the property together with the arrears of income of the estate in his hands, to the successful claimant. In 1874, the mortgagee sued to enforce his securities. The defendant pleaded that he had been in adverse possession for the statutory period from 1861 on the assumption that the possession

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(1) (1871) 14 Moo. I. A. 101, 111.

(2) (1871) 14 Moo. I. A. 144, 150.

(3) (1882) I. L. R. 5 All. 1 ;

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of the Collector was his possession. If this contention were well founded, the case would be, not that of the dispossession of a mortgagor after he had granted a simple mortgage, but that of the grant of a mortgage by a person previously dispossessed; in such a contingency, the adverse possession which had commenced to operate against the mortgagor would not, by the grant of the mortgage, be arrested, but would operate equally against the mortgagee: for, in the words of Lord Kingsdown in *Prannath v. Rookea* (1), a cause of action is not prolonged by mere transfer of the title. The Judicial Committee, however, found that the defendant could not tack to his possession the possession of the Collector and had consequently not been in adverse possession for the statutory period since 1863. Sir Barnes Peacock observed, first, that the possession of the Collector was possession on behalf of the rightful owners, and, secondly, that the rightful owners were the daughter's sons and not the brother's grandsons as found in a proceeding of the arbitrators, whose decision did not bind the plaintiff as his bonds were prior to the submission to arbitration. I must decline to hold that the Judicial Committee by implication decided a question of law which was not argued before them and which, upon the pleadings and facts found, could not arise for consideration. There is no warrant whatever for the inference that the Judicial Committee assumed that a suit for sale by a simple mortgagee was a suit for possession. Sir Barnes Peacock expressly referred to the change in the law effected by the Limitation Act of 1871 and could not have held that a suit for sale was a suit for possession, as might possibly have been held under the Limitation Act of 1859: *Surwan Hossain v. Golam Mahommed* (2),

(1) (1859) 7 Moo. I. A. 323, 355.

(2) (1868) 9. W. R. 170, 174.

Juneswar v. Mahabeer (1), *Chetti Gaudan v. Sundaram Pillai* (2). Under the present law, however, a suit for sale, such as the present, is in no sense a suit by a simple mortgagee for possession of an interest in immovable property: *Vasudeva Mudaliar v. Srinivasa Pillai* (3). The Judicial Committee could hardly have overlooked the distinction between section 1, clause 12, of Act XIV of 1859 and Art. 145 of Act IX of 1871, the former of which they have characterised as an inartificially drawn statute and the latter as a more carefully drawn statute: *Maharana v. Desai* (4), *Delhi and London Bank v. Orchard* (5). I think it is reasonably plain that the decisions of the Judicial Committee in *Prannath v. Rookea* [(6)] and *Karan Singh v. Bakar Ali* (7), do not conclude the question in controversy and do not directly or indirectly support the contention of the respondents.

As regards the second branch of the contention of the respondent, I am of opinion that the decision in *Ram Coomar v. Prosunno* (8), does not conflict with that in *Aimadar v. Makhan Lal* (9).

The earlier case arose out of a suit by a mortgagee for possession after foreclosure and was decided under the Limitation Act of 1859. The provisions of the statute were, as I have just explained, radically different from those in the Limitation Act now in force, and that decision cannot be treated as an authority now binding upon us. I do not, however, decide that the case of *Ram Kumar v. Prosunno*

(1) (1875) I. L. R. 1 Calc. 163 ;

L. R. 3. I. A. 1.

(2) (1864) 2 Mad. H. C. R. 51.

(3) (1907) I. L. R. 30 Mad. 426 ;

L. R. 34 I. A. 187.

(4) (1873) L. R. 1 I. A. 34 ;

13 B. L. R. 254.

(5) (1877) I. L. R. 3 Calc. 47 ;

L. R. 4 I. A. 127.

(6) (1859) 7 Moo. I. A. 323, 355.

(7) (1882) I. L. R. 5 All. 1 ;

L. R. 9 I. A. 99.

(8) (1864) W. R. 375.

(9) (1906) I. L. R. 33 Calc. 1015 ;

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Kumar (1), was correctly decided even under the law as it stood in 1859; indeed, it appears to me to be incapable of reconciliation with the principle deducible from the decision of the House of Lords in *Pugh v. Heath* (2), namely, that on foreclosure, a fresh right of action arises for possession as owner, or, as it is said, the decree absolute gives a new right, confers a new estate and thereby absolutely bars the statute of limitation. I cannot, consequently, accept the contention that the decision in *Ramkumar v. Prosunno* (1), assists the respondent, and the same observation applies to *Sheosunker Sahoo v. Bhowanee Deen* (3).

As regards the third branch of the contention of the respondent, it is indisputable that the balance of judicial opinion is in favour of the appellant. The earlier cases are reviewed in my judgment in the case of *Nanda Kumar v. Ajodhya* (4), [where the question was expressly left open for future consideration], and need not be analysed afresh: it is sufficient to state that the conflict of judicial opinion in Madras, as indicated in *Parthasarathy v. Lakshmana* (5) and *Ramasami v. Ponna* (6), has now been settled by a Full Bench in *Vyapuri v. Sonamma* (7) which, upon an exhaustive examination of the question from various points of view, affirms the principle that the possession of the trespasser, who has dispossessed a simple mortgagor, is not adverse to the simple mortgagee [see also *Periya v. Shunmuga* 8]. The same view has been adopted in Allahabad: *Nandan Singh*

(1) (1864) W. R. 373.

(2) (1882) 7 Ap. Cas. 235.

(3) (1870) 2 All. H. C. R. 223.

(4) (1911) 14 C. L. J. 292.

(5) (1911) I. L. R. 35 Mad. 231;

21 Mad. L. J. 467.

(6) (1910) I. L. R. 36 Mad. 97;

21 Mad. L. J. 397.

(7) (1915) I. L. R. 39 Mad. 811;

29 Mad. L. J. 645.

(8) (1913) I. L. R. 38 Mad. 903.

v. *Jumman* (1), *Raj Nath v. Narain* (2). It is not necessary to consider the class of cases of which *Kanhoo Lal v. Manki Bibi* (3), and *Tarubai v. Venkatrao* (4) may be taken as the type, where a question arose as to the effect of adverse possession against a mortgagee upon the title of the mortgagor; nor need we consider the law on the subject in England which, as shown in *Nanda Kumar v. Ajodhya* (5), does not support the contention of the respondent and lays down in fact that a charge on the property can be enforced against a trespasser who has acquired a title by adverse possession [see the judgment of Farwell J. in *In re Nisbet and Potts' Contract* (6), and *Ludbrook v. Ludbrook* (7)].

I hold, accordingly, that this appeal must be allowed with costs, the decree of Mr. Justice Fletcher reversed and that of the Subordinate Judge restored.

G. S.

Appeal allowed

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| (1) (1912) I. L. R. 34 All. 640 ; | (4) (1902) I. L. R. 27 Bom. 43. |
| 10 All. L. J. 278. | (5) (1911) 14 C. L. J. 292. |
| (2) (1914) I. L. R. 36 All. 567, 571. | (6) [1906] 1 Ch. 386, 391. |
| (3) (1902) 6 C. W. N. 601. | (7) [1901] 2 K. B. 96. |

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APPELLATE CIVIL.

Before Fletcher and Teunon JJ.

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v.

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*Mortgage—Leasehold property—Mortgagee, if entitled to pay rent to
reserve property from being lost.*

The mortgagee is entitled to preserve mortgaged property from being lost for non-payment of rent.

Where rent is thus paid after the preliminary decree and before the final decree, the money paid for rent should in the final decree be added to the mortgage money found due in the preliminary decree.

APPEAL by the Allahabad Bank, Ltd., the plaintiff-mortgagee.

This was a suit to enforce a mortgage-deed purporting to be executed by defendants Nos. 1 and 2 jointly. The claim was laid at Rs. 63,411-5-8. Defendant No. 1 contended, *inter alia*, that the bond in suit was not executed and attested as required by law, that it was obtained from him by undue influence and that he was not liable to pay the sum of Rs. 36,269-10 sought to be recovered from him. Defendant No. 2 did not deny having joined with the other defendant in executing the deed, but he did not admit the correctness of the account appended to the plaint. He contended further that his liability was limited to making good the deficiency, if any, that might arise if the proceeds of the sale should fail to satisfy the mortgage-debt. The Subordinate Judge overruled

* Appeal from Original Decree, No. 448 of 1915, against the decree of Debendra Nath Pal, Subordinate Judge of Howrah, dated Aug. 20, 1915.

nearly all the contentions of the defendants and passed a preliminary decree for Rs. 67,990-0-9 in favour of the plaintiff Bank. Thereafter the decree-holder, on the order of the Court, paid off arrears of rent of the mortgaged property, amounting to Rs. 8,087-5-6, which the mortgagor had failed to pay, in order to perfect the mortgagee's interest at stake. The decree-holder Bank then applied to the trying Judge to allow the said amount of Rs. 8,087-5-6 to be added to the amount decreed as cost in the suit against both the judgment-debtors. The application was rejected as, according to the Judge, there was "no covenant or agreement in the mortgage-bond to the effect that such arrears if paid by the mortgagee" would "be a charge upon the mortgaged property and" would "be added to the mortgage money." The amount of Rs. 8,087-5-6 was not, therefore, included in the final decree. The plaintiffs decree-holders then appealed to the High Court.

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Mr. B. C. Mitter (with him *Babu Ambikapada Chaudhuri*), for the appellant. The plaintiffs-mortgagees are entitled to add the money which they paid for the preservation of the mortgaged property to the amount due on the mortgage. The mortgage is a mortgage of leasehold property. The mortgagor was bound under the terms of section 65 of the Transfer of Property Act to pay the rent falling due under the lease. And money so paid by the mortgagee is always added to the amount due on the mortgage.

Dr. Dwarkanath Mitra (with him *Babu Debendranath Mandal* and *Babu Satindranath Mukerji*), for the respondents. A final decree for sale under Order XXXIV, rule 5, cannot add to the liability of the judgment-debtor which has been fixed in the preliminary decree, except with regard to any additional costs

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under rule 10 of that Order. The words of rule 5, on which I rely, are "the amount declared due as aforesaid together with such subsequent costs as are mentioned in rule 10." All that the decree-holder is entitled to, under rule 5, is to have a final decree only for the amount which has been declared due in the preliminary decree plus any additional costs which may have been incurred under rule 10.

The final decree cannot go behind the preliminary decree. The drawing up of the final decree is more or less a formal matter and is one in execution. An application for an order absolute was treated as an application for execution of the preliminary decree in *Amlook Chand Parrack v. Sarat Chunder Mukherjee* (1), which was affirmed by the Privy Council (2).

The implied covenant to pay the public charges is merely personal to the mortgagor. It is not a covenant running with the land. The covenant would come to an end if the equity of redemption is transferred to a third person: *Balkrishna Mhadshet v. Vishvanath Keshav Jog* (3) and *Pathukutti v. Avathalakutti* (4).

Moreover, in this case, the money was not paid to save the property from forfeiture. It was paid after a decree for rent was obtained and hence after the landlord had waived his right to forfeiture.

FLETCHER J. This is an appeal from the decision of the learned Subordinate Judge of Howrah dated the 10th August, 1915. The appeal is preferred nominally against a decree absolute in a suit for sale brought to enforce a mortgage security. On the 25th February, 1913, the first defendant along with the second defendant who is a surety for him executed in favour of the

(1) (1911) L. L. R. 38 Calc. 913.

(3) (1894) I. L. R. 19 Bom. 528.

(2) (1914) I. L. R. 42 Calc. 776.

(4) (1889) I. L. R. 13 Mad. 66.

plaintiff-appellant, the Allahabad Bank, Limited, a mortgage for Rs. 55,918-15-9. A suit was subsequently instituted by the Allahabad Bank and a preliminary decree was passed on the 10th September, 1914. That preliminary decree found the sum of Rs. 67,990-0-9 as due to the plaintiff Bank and fixed a period of two months for redemption. The decree being made *ex parte*, the defendant No. 1 applied to set it aside. That application was unsuccessful and the order was upheld by the High Court. Then, on the 6th January, 1915, there was an order relating to the payment by the plaintiff Bank of rents in arrear which the mortgagor did not pay. On the 28th January, 1915, the plaintiff Bank applied to the learned Subordinate Judge for the appointment of a Receiver. That was refused and, upon appeal to the High Court, that order was set aside. On the 19th February, 1915, the plaintiff Bank paid to the landlord—the property included in the mortgage being a leasehold property—the sum of Rs. 8,087-5-6 in respect of rent. Thereupon, he applied to the learned Subordinate Judge for leave to add the money so paid to the amount due on the mortgage. But the learned Subordinate Judge on the 20th August, 1915, refused that application on the ground that there was no express covenant in the mortgage bond entitling the plaintiff to add such arrears to the amount due in his mortgage. In substance, the appeal is preferred against that order.

Under Order XXXIV, rule 2 of the Civil Procedure Code, in a suit either for foreclosure or sale when the plaintiff succeeds the Court has either to direct an account to be taken of what is due to the plaintiff for principal and interest upon the mortgage security and for the costs of the suit or to find the sum due. But as a matter of practice the latter course is followed in the courts in Mofussil. The learned Judge in this

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case having by his judgment decided that the plaintiff is entitled to succeed proceeds to calculate the amount due upon his mortgage and, instead of directing an account to be taken, he inserts in the preliminary decree the actual amount which the defendant is liable to pay. That, of course, is a method which has certain advantages. That the account is not adjusted once for all appears quite clear from the other rules of the Order. For instance, Order XXXIV, rule 10 mentions the final adjustment of the amount. So, the amount may from time to time vary. The present application is to add this money that was spent for the preservation of the property to the amount due on the mortgage. The mortgage is a mortgage of leasehold property. The mortgagor was bound by the terms of the law to pay the rent becoming due under the lease and it has always been held that money so paid by the mortgagee can be added to the amount due on the mortgage. That is the view expressed by Sir Rashbehary Ghose in his Treatise on the Law of Mortgage in British India, and it may also be found in any text book on the subject. The same view has been supported in the many decisions of this Court and I am not satisfied that Dr. Mitra's view that the cases in the Madras and the Bombay High Courts really cast a doubt upon that view at all is tenable. There cannot be, I think, any doubt that in the account, the mortgagee can claim money properly paid by him for either supporting or defending the title to the mortgaged property. Money paid for rent has always been held to be part of the mortgage money. It seems to me that, in substance, that is what the plaintiff has been asking for in this case, namely, to be allowed to add the money that he has paid to the landlord for rent in respect of the mortgaged property. If that is so, that money is a portion

of the money secured by the mortgage. That being so, of course, the question that Dr. Mitra has raised about the final decree in a foreclosure suit being really a matter in execution cannot possibly arise.

The next point is, a question of fact, namely, whether this money was, in fact, paid for the preservation of the property. The rent was paid obviously to preserve the property. It is said that the landlord having obtained a rent decree, could only execute that decree in a particular way. Whether that is so or not, it does not matter. I do not think that the mortgagee is not authorised to preserve the property from being lost for non-payment of rent. Dr. Mitra has cited no authority that the mortgagee is bound to leave the property in jeopardy until the Court decides the matter one way or the other. I see no reason why we should lay down for the first time such a rule. I think the learned Subordinate Judge was manifestly wrong in not allowing the plaintiff the money which he has clearly paid for the purpose of preserving the property. I think the present appeal ought to be allowed and this amount of Rs. 8,087-5-6 which has been paid by the plaintiff-mortgagee for the rent of the property ought to be added to and form a part of the money found due on the mortgage. That being so, the present appeal must be allowed. The defendant No. 1 respondent must pay the plaintiff-appellant his costs in this Court and in the lower Court incurred in the application. These costs will be added to the mortgage security. The period of redemption is also extended to three weeks from this date.

TEUNON J. I agree.

S. M.

Appeal allowed.

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CIVIL RULE.

Before Mookerjee and Cuming JJ.

RAJENDRA LAL SUR

v.

ATAL BIHARI SUR.*

1916.

June 23.

*Jurisdiction of High Court—Civil Procedure Code (Act V of 1908), s. 115 ;
O. XXIII, r. 1—Withdrawal of suit under O. XXIII, r. 1—Notice
to the other side, if necessary—Judicial order—Practice.*

The High Court has power to set aside orders made under Order XXIII, rule 1, in the exercise of the powers vested in it by section 115 of the Code of Civil Procedure.

Khanda Coal Co. v. Durga Charun (1), *Mabulla v. Hemangini* (2), *Ram Krishna v. Ram Kirpanidh* (3), *Umesh Chandra Palodhi v. Rakhal Chandra Chatterjee* (4), *Buratha Gunta v. Thurlapatti* (5) referred to.

Though rule 1 of Order XXIII of the Code of Civil Procedure does not specifically require that notice of an application under it must be given to the opposite party, still it is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard.

Ajant Singh v. F. T. Christian (6) referred to.

Bansi Singh v. Kishun Lall Thakur (7) dissented from.

THIS was a Rule to set aside an order under rule 1 of Order XXIII of the Code of Civil Procedure. The facts are briefly these. On the 30th of June 1915, the plaintiffs instituted a suit for partition in the Court

* Civil Rule No. 276 of 1916, against the order of Umesh Chandra Chakrabarty, Subordinate Judge of 24-Parganas, dated Jan. 13, 1916.

(1) (1909) 11 C. L. J. 45.

(4) (1911) 15 C. W. N. 666.

(2) (1910) 11 C. L. J. 512.

(5) (1910) 9 Mad. L. T. 204.

(3) (1912) 9 All. L. J. 358.

(6) (1912) 17 C. W. N. 862.

(7) (1913) I. L. R. 41 Calc. 632.

of the first Subordinate Judge of Alipore against the present petitioner and others and valued the properties at Rs. 8,000. The petitioner and the other defendants filed their respective written statements on various dates. In these several written statements the defendants did not raise any objections with regard to non-joinder of parties, but contended, *inter alia*, that the suit was not a *bonâ fide* one and that the plaintiffs had neither title nor possession and that they could not sue on a court-fee stamp of Rs. 10.

Issues were settled on the 21st of August 1915. No issue was raised on behalf of any of the parties as to the non-joinder of parties. On the 6th of January 1916, plaintiffs applied for time for production of evidence on the question of court-fee. The case was adjourned till the following day for evidence on the question of court-fee. Both parties were directed to come with their evidence. On the 7th of January the Court, after examining four witnesses on behalf of the plaintiffs and one on behalf of the petitioner, on the point of valuation and court-fee, reserved judgment. On the 12th of January 1916, the plaintiffs, without notice to the petitioner or to any other defendants, applied for an order that they might be allowed to withdraw that suit with liberty to bring a fresh suit. On the 13th of January 1916, the Subordinate Judge without notice to the petitioner or to any other defendant made the following order: "Plaintiffs are permitted to withdraw and bring a new suit. In the special circumstances of the case I make no order as to costs."

The petitioner moved this Court against the order of withdrawal and obtained a Rule.

Babu Provas Chandra Mitter and Babu Sailendra Nath Mookerjee, for the petitioner.

Babu Niranjan Roy Chowdhury, Babu Kshitis

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Chandra Chakrabarti and Babu Bimala Charan Deb,
for the opposite party.

MOOKERJEE AND CUMING JJ. We are invited in this Rule to set aside an order made under rule 1 of Order XXIII of the Code of Civil Procedure. The petitioner was a defendant in a suit for partition of joint property, and contested the claim on the ground, amongst others, that the plaint was insufficiently stamped. An issue was raised upon this preliminary point, and after various interlocutory orders, which need not be set out in detail for our present purpose, the Court decided on the 6th January 1916, to determine the question of court-fees thus raised. On the day following, witnesses were examined, arguments were heard and judgment was reserved. Six days later, we find the following entry in the order-sheet: "Plaintiffs are permitted to withdraw and bring a new suit. In the special circumstances of the case, I make no order as to costs." What had happened was that on the 12th January, the plaintiffs presented an application to the Subordinate Judge under rule 1 of Order XXIII of the Code of Civil Procedure. They alleged that the suit as constituted was defective for want of parties and that full relief could not be had, unless the suit was reconstituted. No notice of this application was given to the defendants; but the Court proceeded to make the order set out above. The petitioner now prays that the order may be set aside, and his application is supported by some of the other defendants to the suit.

The plaintiffs contend that this Court has no jurisdiction to set aside the order of the Subordinate Judge, and relies upon the *dictum* of Mr. Justice Coxe in the case of *Bansi Singh v. Kishun Lall Thakur* (1), that

a case could not well be said to have been decided within the meaning of section 115 of the Code of Civil Procedure, when the Court had not adjudicated on the merits but had merely permitted the withdrawal of the plaintiff from the suit. We observe, however, that Mr. Justice Digambar Chatterjee did not share the doubt expressed by Mr. Justice Coxe, as to the competency of this Court to interfere with an order improperly made under Order XXIII, rule 1. We may point out that instances are by no means rare where the High Court has set aside orders improperly made under Order XXIII, rule 1, in the exercise of the powers vested in it by section 115 of the Code of Civil Procedure: *Kharda Coal Co. v. Durga Charun* (1), *Mabulla v. Hemangini* (2), *Ram Krishna v. Ram Kirpanidh* (3); or under section 25 of the Provincial Small Cause Courts Act: *Umesh v. Rakhal* (4), *Burath Gunta v. Thurlapatti* (5). We feel no doubt whatever that in any view we have ample jurisdiction under section 107 of the Government of India Act, 1915, to set aside the order of the Subordinate Judge, which cannot possibly be supported, as it was passed without opportunity afforded to the defendants to contest the application for withdrawal made by the plaintiffs. It has been contended, however, on behalf of the plaintiffs that rule 1 of Order XXIII of the Code of Civil Procedure does not specifically require that notice of such an application must be given to the opposite party. That is perfectly true. But as pointed out in the case of *Ajant Singh v. F. T. Christian* (6), it is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly

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affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard; this is merely an instance of the application of the maxim, *audi alteram partem*. In the present case, the defendants have incurred costs to resist the claim of the plaintiffs. They have not had opportunity given to them by the Subordinate Judge to contest the truth of the allegations made by the plaintiffs in their application for withdrawal from the suit. If they had notice of the application, they might well have appeared and contended, that although the plaintiffs might be allowed to withdraw from the suit, they should not be permitted to harass the defendants with a fresh suit on the same cause of action. They might also have urged that even if an order were made in terms of the petition, the defendants should be indemnified to the extent of the costs incurred by them. We are of opinion that the Subordinate Judge should not have made an *ex parte* order of this description and that he has acted with material irregularity in the exercise of his jurisdiction.

The result is, that this Rule is made absolute, the order of the Subordinate Judge discharged and the case remitted to the Court below in order that the application of the plaintiffs may be heard in the presence of all the parties concerned. The petitioner is entitled to the costs of this Rule.

S. K. B.

Rule absolute.

ORIGINAL CRIMINAL.

Before Chaudhuri J.

In re JEW A NATHOO AND OTHERS.*

1916

July 18.

Habeas Corpus—High Court, jurisdiction of—Power to issue writ—Procedure—Rights of the East India Company—Allegiance of the subject and sovereignty of the Crown—Prerogatives—Governor-General in Council, powers of legislation of—Emergency legislation—Act embodying provisions of Ordinances—Order for internment—Form of order—Warrant to arrest and imprison—Application for bail—Code of Criminal Procedure (Act V of 1898), s. 49—Emergency Legislation Continuance Act (I of 1915)—Ordinances III and V of 1914—Indian Councils Act (24 & 25 Vict., c. 67), ss. 22 and 23—East India Company's Act (26 Geo. III c. 57), s. 29—Foreign Jurisdiction and Extradition Acts (XI of 1872), (XXI of 1879) and (V of 1903)—Interpretation Act (52 & 53 Vict. c. 63), s. 11—General Clauses Acts (I of 1868), s. 3 and (X of 1897), ss. 6 and 7.

Under s. 23 of the Indian Councils Act, 1861 (24 & 25 Vict. c. 67) no Ordinance can have any force of law for more than 6 months from its promulgation, but the Governor-General in Council has the power to pass an Act embodying the provisions of an Ordinance.

The Governor-General in Council has also the power to oust the jurisdiction of the Courts, and s. 11 of Ordinance III of 1914, which is embodied in Act I of 1915 and which seeks to oust the jurisdiction of the Courts, does not offend against s. 22 of the Indian Councils Act, 1861.

Act I of 1915 is not an Ordinance extended, but an Act. It does not offend against the allegiance of the subject, or the sovereignty of the Crown. It is not *ultra vires*, and this Court has no jurisdiction to call in question the orders which have been passed thereunder. It is for the Governor-General in Council to be satisfied on the materials before him. The Court cannot call for the materials to examine them.

In the matter of Rudolf Stallmann (1), *Levinger v. Reg* (2), *In the matter of Tuckut Roy* (3), *In the matter of Ameer Khan* (4), *The same Case on*

* Ordinary Original Criminal Jurisdiction.

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| (1) (1911) I. L. R. 39 Calc. 164. | (3) (1858) 1 Boulnois 354. |
| (2) (1870) L. R. 3 P. C. 282. | (4) (1870) 6 B. L. R. 392. |

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appeal (1), *Alter Caufman v. The Government of Bombay* (2), *The Queen v. Burah* (3) and *Reg v. Halliday* (4) referred to.

Where an Act repeals a previous Act, or a certain provision thereof and the repealing enactment is itself subsequently repealed by another Act :—

Held, that the last repeal did not since 1850, revive the Act or provision before repealed, unless there are words reviving them. There was nothing in any of the Acts subsequent to the repealing Act (XI of 1872) which revived s. 29 of the East India Company's Act (26 Geo. III, c. 57).

Where a person is detained in custody and an application is made to the Court under s. 491 of the Criminal Procedure Code :—

Held, that the usual procedure was to issue a Rule in the first instance, and not to order the production of the petitioner.

APPLICATION by Jewa Nathoo and four others, petitioners.

The petitioners were inhabitants of Surat and had been doing business as traders for some years in South Africa, where they had invested all their savings in sovereigns and gold nuggets as a safe and convenient form of investment during the war. On the 19th June 1916, they arrived in Calcutta by s.s. "Kathiwar" and were immediately arrested under the orders of the Commissioner of Police with all their belongings and put in charge of Mr. F. S. R. A. Anley, the Senior Deputy Commissioner of Police, who first kept them in the Central Police lock-up at Lall Bazar, and subsequently removed them to the Alipur Central Jail. No warrant or order was ever produced, or read out to them and the only information they received, on each of the three occasions they applied for bail to Mr. Anley, was, that they had been arrested under section 54 of the Criminal Procedure Code and Indian Ordinances which were not specified, that a cable had been sent to South Africa to make enquiries regarding them and

(1) (1870) 6 B. L. R. 459.

(3) (1878) L. R. 3 A. C. 889 ;

(2) (1894) I. L. R. 18 Bom. 636.

L. R. 5 I. A. 178.

(4) [1916] 1 K. B. 738 ; 20 C. W. N. (Notes) xci.

that nothing could be done until the reply came to the enquiries ; no idea as to the time of arrival of which was given. Having failed to obtain bail, the petitioners memorialised the Government of Bengal, but the Government refused to interfere on the ground that it was an ordinary criminal case. The petitioners, thereupon, applied to the High Court on the 3rd July, 1916, under section 491 of the Criminal Procedure Code and obtained an order calling upon the Commissioner of Police and the Officer in charge of the Alipur Jail to produce them before the said Court to be dealt with according to law. On the matter coming on for hearing before Mr. Justice Chaudhuri on the 5th July, 1916, Mr. Eardley Norton, who appeared for the petitioners, submitted he was entitled to bail on the ground that the procedure of being kept in custody was not justified and consequently illegal, inasmuch as the petitioners were not told under what ordinance they were kept detained in custody and no order to this effect was produced. Mr. B. C. Mitter, Standing Counsel, who appeared on behalf of the Crown, stated that the petitioners had been interned under the provisions of Ordinances III and V of 1914, which had been embodied in the Emergency Legislation Continuance Act (I of 1915) and handed copies of these Ordinances and the Act to Mr. Eardley Norton, who then asked for time to consider the position. Mr. Justice Chaudhuri, thereupon, directed the petitioners to file affidavits and give copies of the same to the Crown law-officers whose reply thereto, if any, was to be on affidavits, and fixed the 11th July, 1916, for the hearing.

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The Advocate-General (Sir. S. P. Sinha) (with him Mr. B. C. Mitter, the Standing Counsel), for the Government. The usual procedure in such cases was by Rule and notice given to the opposite party. In

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this case, however, the prisoners had been brought up on a warrant and they were present in Court.

Mr. Eardley Norton (with him *Mr. A. A. Ave-toom*), for the applicants. *First*, assuming that the orders for internment were not *ultra vires*, and illegal, the Ordinances III and V of 1914 were not legally in force. Under section 23 of the Indian Councils Act, 24 & 25 Vict., c. 67, no Ordinance could have existence for a longer period than 6 months from the date of its promulgation. It was not urged that the Ordinance could not be brought into force again by re-enactment, but section 23 did not give power to extend the Ordinance after the expiry of 6 months as in this case. Act I of 1915, which purported to extend the period of the Ordinances in question, was, therefore, *ultra vires*. In the Indian Councils Act the words were allowing, controlling and superseding and nothing was mentioned as to re-enacting. It did not authorise the Government to legislate, so as to convert an Ordinance into an Act and, furthermore, the affidavits pleaded the Ordinances and not Act I of 1915.

Secondly, the Governor-General in Council had no power to make any Ordinance or provide any legislation which was in conflict with section 22 of the Indian Councils Act, 1861. Under this section the Governor-General in Council had no power to legislate with regard to anything which affected the constitution and rights of the East India Company, or the allegiance of the subject, or the sovereignty of the Crown. The present case infringed all three of them.

As to the rights of the East India Company, one of these rights was contained in the East India Company's Act, 26 Geo. III c. 57, s. 29, and no local authority had the power to interfere with those rights. This section of this Act was repealed by the Foreign

Jurisdiction and Extradition Act (XI of 1872) which was itself *ultra vires* and was itself repealed by the Foreign Jurisdiction and Extradition Act (XXI of 1879). The provisions of section 29 of the East India Company's Act must, therefore, be considered as restored.

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As to the allegiance of the subject and the sovereignty of the Crown, these two went together. Act I of 1915 interfered with them both and suspended the Habeas Corpus. The writ of Habeas Corpus was a certain prerogative writ which the Crown issued under its prerogatives to protect the rights and liberties of its subjects and there was nothing either in this Act or in the Ordinances in question which expressly suspended the Habeas Corpus, and no inference could possibly be made to this effect. The case of *In the matter of Rudolf Stallmann*(1) was referred to and relied upon in support of this contention. Section 11 of Ordinance III of 1914 and section 2 of Ordinance V of 1914 were referred to. The orders must recite the Act and not merely the Ordinances. There must be a distinct statement in them of the Acts prejudicial to the State for which the prisoners were being prosecuted. After having recited the Ordinances the Governor's order must strictly follow the requirements of the Ordinances and set out the Act prejudicial to the State. The interest of the State was not a proper return under the Act. No such definite purpose was set out in the orders. This return, therefore, was not in accordance with the Ordinances. Dicey's Law of the Constitution, Edn. 1889, p. 203, was referred to.

The Advocate-General (contra). The law on this question had been settled as early as 1858. It was discussed in *Ameer Khan's Case*(2). Under section 23 of the Indian Councils Act, the life of an emergency

(1) (1911) I. L. R. 39 Calc. 164, 181, 197. (2) (1870) 6 B. L. R. 392.

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Ordinance was 6 months. This section did not mean that the Legislative Assembly could not make the Ordinances the law of the country. By Act I of 1915 the Legislature made these Ordinances law for the period therein stated, by incorporating them into its provisions, a method frequently adopted by the Legislature. This Act received the assent of the Governor-General on the 12th January, 1915, and but for it, Ordinances III and V of 1914 would have expired in 6 months' time after their promulgation. By virtue of this Act, however, these Ordinances were in force on the 19th June, 1916.

As to whether the Legislature could suspend the Habeas Corpus Act, this question was precisely what was decided so long ago as 1858 and subsequently in 1870, *In the matter of Ameer Khan*(1). The arguments then urged were precisely the same as those urged now, namely, that the prerogative of the Crown and the allegiance of the subject were affected. The cases of *In the matter of Tuckut Roy* (2), *In the matter of Ameer Khan* (1) and the same case on appeal (3) were relied on.

[CHAUDHURI J. referred to the case of *Alter Cauffman v. The Government of Bombay* (4) where all the previous cases were referred to.]

As to the insufficiency of the return, a reference to Act I of 1915 and the Ordinances referred to therein would show the powers under which the Government acted. These Ordinances were mentioned in the schedule to the Act and were in effect a sort of schedule to the Act. As regards a statement being made in the orders, of acts prejudicial to the State for which the prisoners were being prosecuted, the law did not

(1) (1870) 6 B. L. R. 392.

(3) (1870) 6 B. L. R. 459.

(2) (1858) 1 Boulnois 354.

(4) (1894) I. L. R. 18 B. m. 636.

require such Acts to be specified. It was sufficient for the orders to mention only the Ordinances, and Act I of 1915 had been strictly followed in every detail.

The procedure was under an extraordinary Tribunal and under section 11 of Ordinance III of 1914, Courts of Justice had no power to question the orders made under section 3 of this Ordinance.

Mr. Aveloom, in reply, referred to the case of *In the matter of Rudolf Stallmann* (1). The Court had the power to enquire into the reason for the orders passed in this case. In spite of section 11 of Act I of 1915, the Court had the power to revise these orders and to enquire into the reasons for making them.

Cur. adv. vult.

CHAUDHURI J. This is an application under section 491 of the Criminal Procedure Code on behalf of five persons, inhabitants of Surat, who state that "they had been working as traders in South Africa for some years and had lately invested all their savings in gold sovereigns as they considered it the most safe and convenient form of investment during the war; that they were coming from South Africa by s. s. *Kathiwar*,' which arrived in Calcutta on the 19th June 1916 when they were arrested under the orders of the Commissioner of Police. with all their belongings, including 58 lbs of gold nuggets and 119 sovereigns, without any warrant being produced, or read out to them" They further state that they have been continually in custody ever since their arrest; that they applied for bail to the Senior Deputy Commissioner of Police (in whose hands the case had been placed by the Commissioner of Police) on three occasions, but that it was then said that they had

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been arrested under section 54 of the Criminal Procedure Code and Indian Ordinances which were not specified, and that a cable had been sent to South Africa to make enquiries regarding the petitioners and that no orders could be passed till an answer was obtained from South Africa; and that the Deputy Commissioner of Police could give them no idea as to when it was likely to be received. That failing to obtain bail, they made a representation to the Secretary to the Government of Bengal and were informed that as it was an ordinary criminal case the Government would not interfere. They assert that they have committed no criminal offence. They were at first kept in the Central Police lock-up at Lall Bazar and are now in the Alipur Central Jail, both places being within the ordinary original jurisdiction of this Court. They applied to me on the 3rd July 1916 that the Commissioner of Police and the officer-in-charge of the Alipur Jail should be called upon to produce them before this Court to be dealt with according to law. I, therefore, made an order for their production before me. On the 5th of July, they were so produced when the learned Standing Counsel appeared and stated that the petitioners had been interned under the provisions of Ordinances III and V of 1914 which had been embodied in the Emergency Legislation Continuance Act (I of 1915) and submitted copies of the orders passed by the Governor-in-Council, under which they had been interned. The petitioners then applied that as they were not aware of the Special Ordinances under which the Government had purported to act, they should be allowed time to consider their position. I directed that a return should be made on behalf of the Government and the case of the petitioners be stated, both on affidavits.

I have now before me the affidavit of one Vallub

Dass on behalf of the petitioners in which he has submitted that the orders for interment are *ultra vires* and illegal, in so far as they interfere with their personal liberty, safeguarded as the same is both by the common law and the statutory provisions of the British Parliament.

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It appears from the affidavit filed by the Deputy Commissioner of Police, F. S. R. Anley, that by Notification No. 11312P., dated the 24th November 1914, the Governor of Bengal in Council delegated certain of the powers delegated to him by the Governor-General in Council to supervising officers whereby, *inter alia*, such supervising officers were authorised to detain any person entering the Presidency of Bengal whether by sea or land after the 5th of September 1914 when it appeared to him that such person had entered the Presidency of Bengal, with intent to prosecute some purpose prejudicial to the safety, interest or tranquillity of the State, and that by Notification No. 12148P., dated 10th December 1914, the said F. S. R. Anley was empowered by the Governor-in-Council to exercise the powers of such a supervising officer. By reason of certain information received by him he arrested the petitioners on the 19th June 1916, in pursuance of the powers so vested in him pending the receipt of orders from the Local Government. He reported the matter to the Local Government through the Commissioner of Police on the 20th June 1916, and five different orders dated the 26th June 1916 were received from the Local Government, one in respect of each of the petitioners, under which the petitioners were interned in the Alipur Central Jail. All the orders are practically in the same terms, one of which is quoted below:—

“Whereas by section 3 of the Foreigners Ordinance 1914, (III of 1914), read with section 2 of the Ingress

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into India Ordinance, 1914 (V of 1914) the entry of Foreigners into British India by sea or land can be regulated and restricted.

And whereas by Government of India, Home Department Notification No. 1374, dated the 12th September 1914, the powers conferred by the said Ingress into India Ordinance, 1914, read with the aforementioned Foreigners Ordinance, 1914, have been delegated to the Local Government.

And whereas the Governor-in-Council is satisfied that in order to protect the State from acts prejudicial to interest, it is desirable to exercise the powers under the said Ordinance in respect of Kana Prabhu Patel, son of Prabhoo, village Sassodhra police-station Jalalpur, district Surat, who entered the Presidency of Bengal by sea in s.s. "Kathiwar."

Now, therefore, the Governor-in-Council is pleased to direct that the said Kana Prabhu Patel shall be interned temporarily in the Alipore Central Jail, 24-Pergunnahs. The person interned under this order shall remain in the place appointed unless permitted by the Governor in-Council to leave.

(Sd.) J. G. Cumming,
*Additional Secretary to the
 Government of Bengal."*

Counsel for the petitioners contends that under section 23 of Indian Councils Act, 1861 (24 & 25 Vict c. 67) no Ordinance can have any force of law for more than six months from its promulgation, and that the Governor-General has no power under that section to extend that period. The contention that an Ordinance expires after six months is correct. He argues therefrom that inasmuch as Act I of 1915 extends the period, it is *ultra vires*. In this he overlooks that the power of the Governor-General in Council to pass an Act embodying the provisions of an Ordinance is in

no manner controlled or taken away by that section. It is clear that the Governor-General in Council has power to pass such an Act embodying the provisions of the Ordinances in question. It is not an Ordinance extended but an Act, and I hold against the above contention.

It is next argued that under section 22 of the Indian Councils Act, 1861, it is not in the power of the Governor-General in Council to make such laws as affect the constitution and rights of the East India Company, or any part of the unwritten laws or constitution of the United Kingdom whereon may depend in any degree the allegiance of any person to the Crown, or the sovereignty of the Crown. Counsel argues that inasmuch as section 11 of the Ordinance No. 3 of 1914 embodied in the present enactment, seeks to oust the jurisdiction of the Courts, it offends against section 22 of the Indian Councils Act, 1861. His argument is that section 29 (26 Geo. III. c. 57.) known as the East India Company's Act made residents in India amenable to the Courts, and although that section was repealed by Act XI of 1872, the Repealing Act itself was *ultra vires*: that inasmuch as Act XI of 1872 has again been repealed, section 29 must be considered as restored. It is correct that where an Act is repealed and the repealing enactment is repealed by another, which manifests no intention that the first shall continue repealed, the common law rule was that the repeal of the second Act revived the first. But this rule does not apply to repealing Acts passed since 1850. The last repeal does not now revive the Act or provisions before repealed, unless words be added reviving them: see sections 52 and 53, Vict. c. 63, s. 11. The same principle or rule of law applies to this country. Section 3 of the General Clauses Act, Act I of 1868, expressly provides that for the purpose of reviving either wholly

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or partially a Statute, Act or Regulation repealed, it shall be necessary expressly to state such purpose. The same is the effect of sections 6 and 7 of the General Clause Act X of 1897. Act XI of 1872 was repealed and re-enacted with modifications, by Act XXI of 1879, which after various amendments was again repealed and re-enacted in a modified form by Act V of 1903. I do not find anything in these subsequent Acts reviving section 29 of 26 Geo. III c. 57. Nor does it seem to me to have been necessary to revive the section as various acts and statutes had come into force making the persons mentioned in that section amenable to the Courts of Justice. How we are now concerned with the constitution and rights of the East India Company, I have not been able to follow. I, therefore, hold against the said contentions.

It is further argued that the present Act also offends against the allegiance of the subject and the sovereignty of the Crown, which are said to be "inter-dependent." One branch of the argument is that the said Ordinances and Act I of 1915 have not expressly suspended the Habeas Corpus and no inference that it has been suspended can therefore be inferred, and reliance is strongly placed upon the following passages in the judgments of Woodroffe and Mookerjee JJ. in *Rudolf Stallman's Case* (1). Woodroffe J. says as follows (see page 182):—"It must be shown that a supreme right such as that to Habeas Corpus or to directions in the nature of that writ, has been expressly, if that be possible to the Legislature, taken away." Mookerjee J. says (see p. 198):—"The burden lies very heavily upon those who, in the words of Sir Joseph Napier in *Levinger v. Reg.* (2), assert that a right of so much importance to the criminal given

(1) (1911) I. L. R. 39 Calc. 164.

(2) (1870) L. R. 3 P. C. 282.

by the Common Law has been taken away by implication." The learned Judges held in that case that the English Extradition Act expressly referred to the Habeas Corpus, but the Indian Act did not; that if the Legislature had intended to withdraw the matter from the cognizance of the Indian Courts it would have said so, but as it had not, the Court had jurisdiction under section 491 of the Criminal Procedure Code to enquire into the validity of the warrant under which the petitioner had been kept in custody." Mookerjee J. said that it was not necessary in that case to consider whether a writ of Habeas Corpus could be issued by this Court or whether the right of the Court to issue such a writ could be taken away by the Indian Legislature." The question of the prerogative of the Crown and the allegiance of the subject, has been discussed in a great many cases in our Courts. Among them may be mentioned "*In the matter of Tuckut Roy* (1) in which Colville C.J., in discussing Regulation 3 of 1818 and Act 34 of 1850, expressed himself thus (see p. 357): "It cannot now be contended that the Governor-General acting under the Statute (13 Geo. III c. 33) had no power to legislate for the subjects of the British Government as was done by Regulation III of 1818, but it possibly was meant by the statute to import some such qualification as was afterwards more carefully expressed in section 43 of the Statute (3 & 4 Wm. IV, c. 85)." He thought that it certainly was rather a startling proposition that a law passed to increase the power of those who represented the Crown, and in abrogation of the rights of those who had withstood that power, should be treated as affecting the Prerogative; and this probably was one of those cases where a confusion arose as to the meaning of a word, from a difference in

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its use, in rhetoric and in logic. He held that by legislation of this character the Prerogative was not affected. He said "it is not for the Court to assume a power of disregarding what is made part of the law of the land. It is not our part to consider what the Legislature ought to have done ; we are only to consider the law ; and if we find that it has established certain principles and made certain provisions, it is our duty to obey them."

In *Ameer Khan's Case* (1), *In re Tuckut Roy* (2) was discussed. The discussion arose in connection with Regulation III of 1818, which was said to belong to that class of laws which authorised the infliction of penalties, the privation of liberty, even the destruction of life, with a view to the future prevention of crime, and insuring the safety and the well-being of the public. Such legislation, according to Norman J., falls within the principle *salus populi suprema lex*. That learned Judge held in that case that the Governor-General in Council had a power analogous to that which the Parliament of the United Kingdom exercised when by legislative enactment it suspended the Habeas Corpus Act. The questions now raised were elaborately discussed in that case and it was held that the principles which justified the temporary suspension of the Habeas Corpus Act in England justified the Indian Legislature in entrusting to the Governor-General in Council an exceptional power of placing individuals under personal restraint when for the security of the British Dominions, &c., such a course might appear necessary to the Governor-General in Council. He said "The proviso in section 22 is not that no law shall be made contrary to the Magna Charta, or any other similar statute. The Unwritten Constitution of England is of a flexible

(1) (1870) 6 B. L. R. 392.

(2) (1858) 1 Boulnois 354.

character. It admitted a relaxation of the rules securing private rights in times of public distress or danger, *ne quid detrimenti, capiat respublica*."

In the Appeal Court, in the same case (1). Mr. Justice Phear in discussing the same questions, which have been raised before me, said: "The real effect of these Acts is that they create and make lawful a new cause of imprisonment, and constitute the Governor-General in Council a Court, endowed with the fullest discretion to adjudicate such a cause." The argument about allegiance he thought could be carried to the extent that "if the Regulation and Acts were void and of no legal force—the subject had a right by law to disclaim allegiance to the Crown of the United Kingdom." He considered such an argument "startling" and not fit to be entertained. The other Judge in the Appeal Court, Mr. Justice Markby, said that he saw no ground for supposing that an Act affected the Prerogative of the Crown merely because it affected the liberty of the subject. If that were so, then the Indian Legislature would have no power at all to legislate in criminal matters. He held that the allegiance of a British subject in no way whatever depended upon the existence, or non-existence of such a power as was conferred on the Governor-General by the Regulation of 1818. He wholly repudiated the doctrine contended for, that the allegiance of a subject to his Sovereign could by any possibility be legally affected by the mere withdrawal from the subject of any rights, privilege or immunity whatsoever. Practically the same questions were raised in *Alter Cauffman's Case* (2) in which the decision of the Calcutta Court in *Ameer Khan's Case* (1) was quoted with approval. The Indian Legislature both before and after the passing of the Indian Councils Act, 1861, has from

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(1) (1870) 6 B. L. R. 459.

(2) (1894) I. L. R. 18 Bom. 636.

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time to time passed similar enactments authorising the privation of liberty in certain circumstances, and no instance has been cited to me that such acts have been held to be *ultra vires*, or that any of the above arguments which have been repeated from time to time have ever been accepted as correct. The general powers of the Indian Legislature have been discussed in the *Queen v. Burah* (1) which is the leading case on the subject. Lord Selborne laid down in that case:—"If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited, it is not for any Court of Justice to enquire further or to enlarge constructively those conditions and restrictions."

The latest case, in which somewhat similar questions were raised, is that of *Rex v. Halliday* (2). It was contended that it was the usual practice in England to pass an Act suspending the Habeas Corpus Act when circumstances required, the Suspension Act being always followed by an Indemnifying Act. General words, it was argued, ought not to be interpreted as taking away the fundamental rights of individuals as conferred by Statute or the Common Law, but in view of the defence of the Realm (Consolidation) Act, 1914, it was held in the Court of Appeal that the argument was not sound.

The Ordinances in question came into existence in India in circumstances of emergency. Act I of 1915 has been enacted owing to the same emergency and is of a temporary character, it being provided that it is to remain in force during the circumstance of the present war and for a period of six months thereafter.

(1) (1878) L. R. 3 A. C. 889 ;
 L. R. 5 I. A. 178.

(2) [1916] 1 K. B. 738 ;
 20 C. W. N. (Notes) xci.

Section 11 of Ordinance No III of 1914 incorporated in that Act, expressly provides that "No order made under section 3 shall be called in question in any Court."

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It expressly ousts the jurisdiction of the Courts of Justice, that is to say when the requirements and provisions of the Act and Ordinances are fulfilled.

The orders we are dealing with mention that the Governor-General in Council is satisfied that in order to protect the State from acts prejudicial to its interests, it is desirable to exercise the powers under the said Ordinances in respect of the petitioners and that they have accordingly been interned.

Arguments have been addressed to me, with which I am unable to agree, that as the orders do not recite the Act but only the Ordinances, and do not say that "it is desirable to protect the State from the prosecution by the petitioners of some purpose prejudicial to its interests," the orders are bad and inoperative. The sections of the Ordinances are referred to in the orders as they are incorporated in the Act and the wording of the orders seems to me substantially to comply with the requirement of section 2(2) of Ordinance V of 1914. I hold the Act is not *ultra vires* and this Court has no power to call in question the orders which have been passed thereunder. It is for the Governor-General in Council to be satisfied on the materials before him. The Court cannot call for the materials to examine him. The real effect of these Acts, to adopt the language of Phear J., is that they create and make lawful a new cause of imprisonment and constitute the Governor-General in Council a Court, endowed with the fullest discretion to adjudicate such a cause.

The usual procedure in these applications is to issue a Rule in the first instance and not to order the

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production of the petitioners. I departed from this practice as it was, not mentioned in this case that their detention was under the Ordinances, and as it appeared from the affidavit filed on behalf of the petitioners that they had been detained for a considerable time without a warrant, merely on a suspicion that they had committed some unknown offence, which seemed to me *prima facie* illegal and high-handed. It is asserted that even now the Government has no materials upon which they have purported to take action, but I have no power to enquire into that allegation, as the orders comply with the requirements of the Act.

I accordingly dismiss this application.

O. M.

Application dismissed.

Attorney for the applicant : *N. K. Dutt.*

Attorney for the Government : *J. T. Hume.*

FULL BENCH.

Before Sanderson C.J., Mookerjee, Fletcher, Teunon and Chaudhuri JJ.

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Counterfeit Coin—Possession—Custody—“To become possessed” whether “conscious possession” Possession with knowledge—Penal Code (Act XLV of 1860), ss. 7, 27, 243—Misdirection—Review—Powers of High Court—Letters Patent, 1865, cl. 26—Criminal Procedure Code (Act V of 1898) s. 537.

Per CURIAM. To constitute an offence under s. 243 of the Penal Code it is essential to prove that at the time the accused became possessed of the coin he knew it to be counterfeit, whether he was in possession of the coin himself, or his wife, clerk or servant was in possession of the coin on his account.

As there was a misdirection to the Jury in a part of the Judge's summing up which related to a material and essential element of the charge, the conviction should be set aside in review under cl. 26 of the Letters Patent.

Per MOOKERJEE J. The term “possession” has to be interpreted in the light of s. 27, Indian Penal Code, which by virtue of s. 7 is applicable wherever the term is used in the Code. Section 27 abolishes the distinction recognised in English law between possession and custody.

Section 537 of the Criminal Procedure Code has no application to a case reviewed under cl. 26 of the Letters Patent.

Mere non-direction is not necessarily misdirection.

Rex v. Stoddart (1) followed.

The Judge's note of his charge to Jury is conclusive.

King-Emperor v. Upendra Nath Das (2) referred to.

Per FLETCHER J. The point of time to be considered was the time when the accused had actual or conscious possession of the counterfeit coins

* Application for Review under clause 26 of the Letters Patent, 1865.

(1) (1909) 2 Cr. App. Rep. 217, 246. (2) (1914) 21 C. L. J. 377, 391 ;
19 C. W. N. 653.

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for determining whether he had knowledge at the time that the coins were spurious.

Per CHAUDHURI J. There is a clear distinction in law between "custody" and "possession". Custody means possession on account of another.

Section 27, Indian Penal Code, does not express the complete thought of the Legislature on the question of possession, and it is competent to the Court to interpret the words "to become possessed" in accordance with the meaning that the general law has given to them.

In re Proceedings, 22nd December, 1866, (1) referred to.

REFERENCE to Full Bench on a *fiat* of the Advocate-General under cl. 26 of the Letters Patent on the application of Fateh Chand Agarwalla, accused.

Mr. Justice Chaudhuri and a common jury tried one Fateh Chand Agarwalla, at the third Criminal Sessions of the High Court, on two charges under s. 243 of the Penal Code.

The prisoner pleaded not guilty, but the Jury unanimously found him guilty, and his Lordship sentenced him to three years' rigorous imprisonment. The accused then applied to the Advocate-General submitting counsel's statement of the Judge's charge to the Jury, and obtained the following *fiat* under cl. 26 of the Letters Patent:—

"I. Whereas the accused abovenamed was on the 6th July 1916 charged at the Criminal Sessions holden in this Hon'ble Court in its Original Criminal Jurisdiction before the Hon'ble Mr. Justice A. Chaudhuri and a common Jury on an indictment as follows:—

First. That he the said Fateh Chand Agarwalla on or about the 20th day of November in the year of our Lord 1915 in Calcutta aforesaid fraudulently or with intent that fraud might be committed had in his possession certain counterfeit coins that is to say 160 counterfeit Rupees being counterfeit of the King's coin having known at the time when he became possessed of them that they were counterfeit and thereby he the said Fateh Chand Agarwalla committed an offence punishable under section 243 of the Indian Penal Code.

Secondly. That he the said Fateh Chand Agarwalla at or about the

time and in the place aforesaid fraudulently or with intent that fraud might be committed had in his possession certain counterfeit coins that is to say 3 counterfeit rupees being counterfeit of the King's coin having known at the time when he became possessed of them that they were counterfeit and thereby he the said Fateh Chand Agarwalla committed an offence punishable under section 243 of the Indian Penal Code.

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II. Whereas it has been represented to me that the case for the prosecution, as opened by the learned Standing Counsel and as disclosed in the evidence of the prosecution, was as follows :—

(a) That on the 26th November 1915 on a search by the Police at a flour shop at Machuabazar Street, Calcutta, belonging to one Soniram Agarwalla, thirty-one 1898 (Queen) and other base coins were found and Soniram Agarwalla was arrested.

(b) That upon certain information received from Soniram Agarwalla, the shop at No. 24, Armenian Street was raided by the Police at about 10-30 or 11 P.M. on the said 26th November and they found in an iron safe, the key of which was produced by the accused, one hundred and sixty counterfeit coins 1898 (Queen) similar to the thirty-one coins found in the shop of Soniram Agarwalla. The Police further found three counterfeit coins of the year 1901 (Queen) in a wooden box which was inside the iron safe.

(c) That the one hundred and sixty 1898 (Queen) coins were found in the safe inside a bag mixed up with three hundred and thirty seven genuine Rupees. There were also thirty-seven other genuine Rupees besides those stated above found in the safe and Currency Notes to the extent of one thousand five hundred and fifty-five rupees.

(d) That the Police took charge of the—

Rupees 163 counterfeit coins,
 „ 1,555 Currency Notes,
 „ 337 genuine coins, and
 „ 37 genuine coins

as will appear from a copy of the search list prepared by the Police.

(e) That Mr. Lahiri, the Police Officer, who raided the shop of the accused and found the counterfeit coins as stated above, had already in his possession similar counterfeit coins and he knew the difference between these coins and genuine coins at the time when he found the said coins.

(f) That there were some difference in the Queen's effigies in the milling and in the lettering between the said counterfeit coins and genuine coins, but there was very slight difference in weight not ordinarily noticeable no difference in size very slight in sound.

(g) That ordinary business men test the rupee by the sound and that was also the test applied by the Banks.

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(h) That Mr. Lahiri saw Books of Account resembling those put in evidence by the defence at the shop at 24 Armenian Street, on the night of the 26th November 1915.

III. Whereas it has been further represented to me that the case for the defence as disclosed in the evidence was as follows :—

(a) That Gunga Shahay the Cashier of the firm of the accused was in charge of the till and cash of the firm. That he used to receive moneys and make payments and he was so employed in November 1915.

(b) That large sums of money sometimes amounting to Rupees 5,000 used to be daily received by the firm of the accused.

(c) That the only test applied by the said Gunga Shahay when he received payments to find out if the Rupees were good or counterfeit was to place them in stacks of Rs. 20 or so and then to take up one stack at a time and pour the Rupees from one hand to the other and hear the ring. If he found that the ring of any coin did not satisfy him he returned it to the remitter. He did not examine each coin minutely.

(d) That in the Kutcha Rokur Book of the business of the accused which is daily written up, there is an entry dated the 23rd November 1915 which went to show that wheat and flour were on that date sold to the firm of Jumunadas Soniram of the value of Rs. 235 or thereabouts. That the said Kutcha Rokur further shows under the date 26th November 1915 that there is an entry showing a cash receipt of Rs. 222 from the firm of Jumunadas Soniram

(e) That Soniram Agarwalla was the proprietor of the firm of Jumunadas Soniram whose name appears under the two dates in the Kutcha Rokur of the firm of the accused as stated above.

(f) That the said Soniram Agarwalla was the same man in whose shop 31 (1898 Queen) counterfeit rupees were found and who was subsequently convicted of being in possession of counterfeit coins of 1898 (Queen) on 21st February 1916.

(g) That the ledger of the firm of the accused for 1971 Sambat corresponding to 1914 and 1915 contains an account of the said firm of Jumunadas Soniram which shows considerable dealings between the firm of the accused and the said firm in the course of which various sums of money were paid by the firm of Jumunadas Soniram to the firm of the accused.

(h) That the defence was unable to fix from whom they received the 163 counterfeit coins excepting that the firm of the accused received them in the usual course of business. They used to receive a large amount of cash coins in their daily transaction and on the said 26th November 1915 they received cash payment to the extent of about Rs. 790 besides what they already had in the till from the day previous.

IV. Whereas it has been further represented to me that no evidence was adduced by the prosecution either before the Committing Magistrate or before the Sessions Court as to how the accused came into possession of the 163 counterfeit coins or whether he had any knowledge at the time when he came into possession of the same that they were counterfeit or that these coins ever actually came into the hands or custody of the accused or that the accused had any subsequent knowledge that the coins were counterfeit or that the accused kept them with any fraudulent intention or that the accused had anything to do whatsoever with the said counterfeit coins beyond what is stated in the preceding paragraphs hereof.

V. Whereas it has been further represented to me that in cross-examination of the defence witness Gunga Shahay, a question was put to him to the effect that there was an agreement between Soniram Agarwalla and the accused to pass counterfeit coins which the witness answered in the negative. That this case was not made by the prosecution in their opening or during the examination of their witnesses. And that Soniram Agarwalla was not called to prove the alleged agreement stated above.

VI. Whereas it has been further represented to me that the learned Judge charged the Jury and in such charge which was not taken down completely by counsel on either side said as follows :—

‘Counsel for the defence put too narrow a construction on section 243, I. P. C. when he said that the accused must have knowledge at the time when he became possessed of the coins. Knowledge that the coins were counterfeit at the time when he became possessed of the coins was not necessary. It is enough if the accused subsequently became aware of the spurious nature of the coins.’

VII. Whereas it has been further represented to me that the learned Judge omitted to draw the attention of the Jury to the following facts and particulars :—

(a) That there was no evidence to prove that the accused had any knowledge either at the time when they were received in his firm or at any other time before the Police raid that the said 163 coins were counterfeit coins or that he kept them with a fraudulent intention.

(b) That there was no evidence of conspiracy or agreement as stated in paragraph 5 hereof.

(c) That the Police found counterfeit coins mixed up with nearly 400 other good coins without any attempt on the part of the accused to keep them separate.

(d) That it was difficult to distinguish the counterfeit from genuine coins because there was very little difference in sound and weight and no difference in size between them.

(e) That Mr. Lahiri had already in his possession similar counterfeit

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coins before he found those at the shop of the accused and knew actually what their defects were.

(f) That it was not possible or in any case very difficult for the cashier of the accused who applied the sound test, to discover the defects in the coins as pointed out by the expert evidence.

VIII. Whereas it has also been represented to me that the foreman of the Jury cross-examined the defence witness, Chotay Lal, on the extent of the business done by the firm of the accused and in the course of such examination said openly in Court that he personally knew that the firm of the accused was a very small one situated in a small shop at Barra-bazar and so could not do much business as represented by the witness, and that the accused has been seriously prejudiced by the same although the learned Judge warned the Jury the next day that they should not allow personal knowledge to affect their judgment in the case.

IX. And whereas the facts hereinbefore set out have been certified to me by counsel for the accused as appears from the certificate hereunder written :

Now I, Satyendra Prasanna Sinha, Officiating Advocate-General of Bengal, do under and by virtue of the powers entrusted to me by the Letters Patent for the High Court of Judicature at Fort William in Bengal, bearing date the 28th of December 1865, certify that in my judgment whether the direction to the Jury hereinbefore specified was right in law and whether the alleged omissions to direct the Jury do not in law amount to a misdirection, should be further considered by the said High Court.

S. P. SINHA."

"We the undersigned defended the above accused at his trial by the Hon'ble Mr. Justice Chaudhuri presiding at the last Criminal Sessions of the High Court on the 6th and 7th instant and were present at his trial throughout and we certify that the facts hereinbefore set out have been correctly stated to the best of our recollection and belief.

A. P. SEN,

D. N. BASU,

Counsel for the accused."

The matter coming on for hearing before a Full Bench on this petition for review, counsel on both sides accepted Mr. Justice Chaudhuri's note of his charge to the Jury as conclusive.

Mr. Eardley Norton (with him *Mr. A. P. Sen*, *Mr. D. N. Basu* and *Mr. B. N. Ghose*), for the accused.

While in s. 242 the maximum sentence is 3 years under s. 243 it extends to 7 years in case of Queen's coin. Two elements are required for an offence under s. 243: (i) fraud, actual or intention to commit, (ii) possession knowing at time accused became possessed of it that it was counterfeit. Under section 26 of the Charter we appeal that the Judge presiding at the last Criminal Sessions misdirected the Jury on this point. There is no evidence that this money was not received by accused's clerk in his absence. Section 27 of the Indian Penal Code defines possession. This section was read by the Sessions Judge to the Jury. Therefore, he meant to lay down that possession of clerk was possession of accused. I submit that even in the case of constructive possession, at the time I became possessed of them, I could not know they were counterfeit. As the first element of s. 243 is absent, I cannot be convicted thereunder. There is no evidence or charge of abetment. We have proved that there has been a big course of dealing between Soniram's firm and ours. In fact that morning we received money from Soniram. In his possession were found 31 bad coins of 1898 and, therefore, in all probability mine are the same.

[SANDERSON C. J. Was any comparison made of these two sets of bad coin?]

Yes, they tally. The Sessions Judge charged *re conscious* possession. This is a misdirection as the word "conscious" occurs nowhere in the definition: *Emperor v. Ratan Chand Dhanuram* (1).

[FLETCHER J. It is the knowledge of accused at the time he came into possession. Another section deals with attempt to utter.]

Yes, s. 241, Indian Penal Code. In uttering, subsequent knowledge is admissible.

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[SANDERSON C. J. How could he have had any guilty knowledge until he became aware that he had these coins?]

Exactly. In a bag in the iron safe were found 160 bad coins among 500 others, all mixed up. This fact negatives all knowledge and also intent—otherwise he would have separated bad from good.

Section 27 includes wife's and clerk's possession to be master's. Knowledge must be contemporaneous with receipt. Chaudhuri J. read out s. 27 to the Jury, therefore his view then must have been that. S. 27 makes clerk's possession that of the master. There is no evidence of accused's direct possession.

It may be constructive possession, but it is not constructive knowledge. The police say that they got the key from his clerk.

[*The Standing Counsel (Mr. B. C. Mitter)*. The case can only be gone into on the Advocate-General's *fiat* and the Judge's charge to the Jury. All this is not in the *fiat*, and the Judge's charge contradicts it. This is not a Court of Revision. So this reference cannot go on on this *fiat*.]

I submit that consciousness of possession is not consciousness of knowledge. You must prove knowledge as contemporaneous with possession. There is no evidence that accused's possession ever became actual, or when the accused had knowledge of the spurious character of the coins after such possession.

The question of conduct is irrelevant and should never have been put to the Jury *re* knowledge. There is no evidence of knowledge except that accused handed over the key of the safe to the police. The mere fact of new looking spurious coins being found in the bag will not put us on notice, as the learned Judge points out the difficulty of distinguishing them.

As to paragraph 8 in page 11 of the certificate, the

learned Judge's notes are no reply. The foreman of the Jury said "all these goods could not be contained in such a small shop."

[TEUNON J. I don't understand the foreman to say that he knew the accused's shop.]

He said about the goods and his personal knowledge. I submit no conviction can lie in this case under s. 243 of the Penal Code.

Lastly, as s. 27 controls s. 243, with that fact must also go the question of master's knowledge. Reads Gour, Vol. I. Notes under s. 27: *Emperor v. Ratan Chand Dhanuram* (1) says it is to legislate to incorporate word "conscious" possession. *Emperor v. Nakul Kabiraj* (2) lays down the necessity of hearing the actual words of the Code.

The Standing Counsel (Mr. B. C. Mitter), for the Crown. The first question is what are the matters open to this Court to go into. The Advocate-General has not said there was error but says that certain points need to be reconsidered. *King-Emperor v. Upendra Nath Das* (3) and *Reg. v. Pestonji Dinsha* (4) construe clause 26 of the Letters Patent. Non-direction is not a matter under clause 26 at all which deals with decision of a point. They all say that this Court will not go into any points not certified for reconsideration.

[*Mr. Norton*. I have not argued any question of non-direction, but have argued only *re. s. 243*.]

The mere fact that a very large number of counterfeit coin was found in an iron safe and all appear to be struck with same die, indicate guilty knowledge *Queen v. Jarvis* (5).

(1) (1904) 6 Bom. L. R. 887.

(3) (1914) 19 C. W. N. 653.

(2) (1909) 13 C. W. N. 754.

(4) (1873) 10 Bom. H. C. R. 75.

(5) (1855) 7 Cox 53, Dears C. C. 552.

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[TEUNON J. Have you considered the bearing of s. 7 on this case?]

I take it your Lordship means s. 7 taken with s. 27. It was not until the defence witnesses were called that accused's clerk said he handed accused the key, but this was never suggested before.

The question is whether it is possession with knowledge. Guilty knowledge or intention must always be found.

Mr. Norton, in reply. *Mr. Justice Teunon's* discovery of s. 7 justifies my argument that s. 27 controls s. 243. Therefore, the combined effect of ss. 7 and 27 is to make the possession of clerk in s. 243 that of his master. If a conviction is then impossible, the remedy lies with the Legislature. If it is difficult for the prosecution to prove guilt, then why should the prosecution be relieved of its responsibility? "To take a thing into possession" is a narrower construction than to become possessed of a thing. S. 243 is a very very stringent section because the mere bare possession with a guilty intent not translated into action (*i.e.*, without any overt act) is an offence.

[TEUNON J. You say that s. 243 is not applicable to such a case.]

Yes. He may be convicted under any other section. I am to be answerable for my own acts and my own knowledge, and in the absence of any evidence of conspiracy I am presumed to be innocent.

[SANDERSON C. J. As long as the master is ignorant of the possession of his clerk, this section does not apply.]

Yes.

[SANDERSON C. J. Then does it apply as soon as he has knowledge?]

No. S. 243 applies only when the master is cognizant of clerk's possession.

[TEUNON J. In ordinary cases when does the possession of cashier become that of master, when he receives the money, or puts it in the till?]

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When he receives it across the counter. My mere opening of safe is no evidence of knowledge of contents. The prosecution have to prove (i) fraudulent intention, (ii) possession, (iii) contemporaneous knowledge, but, having failed to do so directly, wish to bring forward circumstantial evidence.

[SANDERSON C. J. If we find there has been misdirection are we to go into the evidence?]

There is no alternative but to acquit. As the reported decisions have held that your Lordships have the power to go into the facts, I have no hesitation in doing so, as I think I have a very good case on the evidence. I say there is no case to go to the Jury.

[SANDERSON C. J. Is there any evidence that the accused was absent when possession was made over to his clerk?]

There is such evidence, and there is no evidence that he was present. The charge states "knowing at the time that he became possessed of them that they were counterfeit." There is no evidence that my client, as a merchant, handles the coins of the cash. His clerk does so. I submit this case should never have gone to the Jury, there being no evidence of possession or knowledge or anything connecting the two as contemporaneous.

The Standing Counsel (Mr. B. C. Mitter), for the Crown. I have not got much to add to the evidence placed before your Lordships. Proof that defendant's knowledge that coin was counterfeit follows either from previous utterance or possession of a large number of the same year and made from the same mould: see Archbold's Criminal Practice, 24th Ed.,

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page 1086. No direct evidence can be given in such cases. The conviction was on both counts: see p. 102 of Wills on Circumstantial Evidence. In a coining case the accused should give his explanation if he had a satisfactory one to give. It is impossible to believe that Gunga Sahay, his clerk, had received the money, for had accused said so at the time of his arrest Gunga Sahay would also have been arrested, and, further, in cross-examination Inspector Purna Chandra Lahiri would have been asked this. Even if there had been a misdirection, had the Jury believed the evidence for the defence there would have been an acquittal. It is highly improbable that such a large number of false coins would have been sent to one place without some arrangement. The books of account produced have very little value.

The prosecution was unable to give any evidence as to the hand that actually paid in this money. In s. 27 the words "property of a person" makes it applicable only where the property belongs to a particular person. Suppose Gunga Sahay received it knowing it to be false coin. There is no implied authority for a servant to receive false coin.

[FLETCHER J. Suppose they had been genuine rupees?]

Then it would be within his authority as a cashier.

[SANDERSON C. J. Under s. 243, read with s. 27, there can be possession in accused himself and that of his clerk. Were the Jury asked to say when the money came into the hands of the accused?]

The custody of the clerk became the possession of the accused when he had knowledge of it. Although he had the key, the accused never had physical possession. Refers to Stroud's Judicial Dictionary, Vol. III, page 1516. Possession includes intention to use it if

there is need. See English Coinage Offence Act, 24 & 25 Vict. c. 99, s. 21, and Chitty's Statutes, Vol. III, page 630; Pollock and Wright on Possession, page 196.

Mr. Norton, in reply. I am charged with having received 160 false coins found in my safe. Nothing has been shown to prove that my books are not genuine.

[CHAUDHURI J. It is quite clear that the book is genuine, though the system of keeping the accounts is unusual.]

There is no scintilla of evidence as to possession and knowledge, and knowledge synchronous with the possession. The mere possession of key has absolutely nothing to do with the question of knowledge. The distinction between 'custody' and 'possession' has nothing to do with this case. It is purely legal distinction: *vide* Gour's Penal Law, Vol. I, page 108, quoting Stephens' Criminal Law, page 210. I submit that this distinction has been repealed by the Indian Penal Code.

[CHAUDHURI J. referred to s. 166 of the Penal Code.]

S. 27 draws no distinction between *legal* and *illegal*. The prosecution assumes all along that accused was possessing false coin. But there is no evidence of conspiracy or agreement to possess false coin. There is no evidence that, on getting the key from his clerk, the accused did any overt act to obtain knowledge of the contents of the safe. If the Jury did not believe defence evidence, it was owing to the Judge's misdirection.

The two real points on which their decision should have been invited were never put to the Jury.

Cur. adv. vult.

SANDERSON C. J. In this case the charge against the accused was as follows:—That he the said Fateh

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Chand Agarwalla on or about the 26th day of November in the year of our Lord 1915 in Calcutta aforesaid fraudulently or with intent that fraud might be committed, had in his possession certain counterfeit coins, that is to say, 160 counterfeit rupees, being counterfeit of the King's coin, having known at the time when he became possessed of them that they were counterfeit, and thereby he the said Fateh Chand Agarwalla committed an offence punishable under section 243 of the Indian Penal Code.

Secondly, that he the said Fateh Chand Agarwalla at or about the time and in the place aforesaid fraudulently or with intent that fraud might be committed, had in his possession certain counterfeit coins, that is to say, three counterfeit rupees, being counterfeit of the King's coin, having known at the time when he became possessed of them that they were counterfeit, and thereby he the said Fateh Chand Agarwalla committed an offence punishable under section 243 of the Indian Penal Code.

He was tried at the Criminal Sessions of this Court; the Jury by an unanimous verdict convicted him on both charges and he was sentenced to a term of imprisonment. A representation was made to the Advocate-General who gave a certificate under clause 26 of the Letters Patent to the effect that the question whether the direction to the Jury was right in law and whether certain alleged omissions to direct the Jury do not amount to a misdirection, should be further considered by the High Court and consequently the petition to this Court was presented.

The accused had a place of business at 24, Armenian Street, Calcutta, and the case for the prosecution was that the police in consequence of certain information went on the 26th November 1915 to the shop of one Soniram in Machua Bazar and searched it. They found

in Soniram's shop 31 counterfeit rupees dated 1898. In consequence of information received from Soniram the police proceeded to the shop of the accused 24, Armenian Street, and arrived there between 10-30 P.M. and 11 P.M. on the same evening. The accused, one Gunga Shahay, who was alleged to be the Cashier of the accused, and another man named Chotey Lal, who was alleged to be connected with the business, were present on the premises.

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The evidence of the police officer was that in response to a request by him, the accused opened the safe which was locked, and the key of which was produced by the accused. In the safe was found—

15 G. C. Notes of Rs. 10 each.

1 „ Note „ 5

4 „ Notes „ 100 „

1 „ Note „ 1,000

and 497 rupees; these rupees were in a bag inside the safe.

The officer sorted them and found that 160 were counterfeit coins dated 1898. In a wooden box, which was also inside the safe, there were 40 rupees, 3 of which were counterfeit coins dated 1901. These three counterfeit coins were not mixed up with the other coins in the box.

The coins were produced; the 160 counterfeit coins of 1898 appeared to be new and were obviously made from the same die, and on comparison with the false coins taken from Soniram's shop were found to be similar to them.

The accused was arrested. Before the arrest, according to the police officer's evidence, he was asked for an explanation; he gave one; thereupon the police officers proceeded to Strand Road, and searched the house of a Mahomedan, who was afterwards arrested at Dacca; nothing was found at the house of the

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Mahomedan: the accused also referred the police officers to Soniram,

The case of the accused, to support which Gunga Shahay and Chotey Lal were called as witnesses, was that Gunga Sahay was the cashier, who used to receive the money in the ordinary course of business and that the daily receipts varied from Rs. 2,000 to Rs. 5,000 a day. That when the police came to the shop on the 26th November 1915, Gunga Sahay had the key of the safe, and that he was asked by the accused for the key, and that he gave it to the accused.

The case for the defence further was, that Gunga Shahay must have received the 160 counterfeit rupees, that he did not know they were counterfeit, and it was suggested that the counterfeit money had been received that very day and that it might have been included in a payment of cash, Rs. 222, which Soniram had made that day. Although there were only two payments of cash, of an amount larger than Rs. 160, received on that day, viz., one of Rs. 240 from other business premises of the accused, and one of Rs. 222 from Soniram; and although the counterfeit coins were all obviously new and bright coins and therefore likely to attract attention, Gunga Shahay said he could not make any suggestion from which party the coins came.

The first and main ground of the alleged misdirection was the direction given by the learned Judge to the Jury as to the construction of section 243 of the Indian Penal Code, under which the charge was brought; secondly, it was contended in argument that the learned Judge should have directed the Jury that there was no evidence (a) to show when, if ever, the counterfeit coins came into the actual possession of the accused, (b) to show that the accused had knowledge of the spurious character of the coins either when

they were received by his servant, or at any time before the police raid.

With regard to the construction of the section, the passage of the summing up which was laid before the Advocate-General, and upon which the certificate was based, was taken from learned Counsel's notes ; but admittedly it did not represent a full or complete statement of the learned Judge's charge on this point. It was as follows :—" Counsel for the defence put too narrow a construction on section 243 of the Indian Penal Code, when he said that the accused must have knowledge at the time when he became possessed of the coins. Knowledge that the coins were counterfeit at the time when he became possessed of the coins was not necessary. It is enough if the accused subsequently became aware of the spurious nature of the coins."

The learned Judge has supplied the Court and the parties with a memorandum of his summing up made for the purpose of this appeal, from his recollection and the notes which he used for his summing up, and it is upon the summing up as shown in the memorandum that the case was argued by both sides.

The learned Judge first dealt with the question of fraudulent intent, then with possession, in which connection he drew the attention of the Jury to section 27 of the Indian Penal Code and pointed out " that the law made possession of the servant on account of his master the possession of the master. The question of possession, therefore, was free from difficulty."

He then dealt with the question of knowledge and after pointing out that it must be the personal knowledge of the accused, and that the knowledge of the servant would not be sufficient, he directed the Jury that they had to decide two matters in this connection—(i) Had the accused knowledge that he

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was possessed of counterfeit coins. (ii) If he had knowledge, did he intend fraudulent use and, if so, at what time did he so intend?

After dealing with the first point and telling the Jury that they had to find on the evidence whether the accused had actual knowledge or not, he then proceeded to direct the Jury as to the *time of knowledge in connection with intention as follows* :—

“The next point was about the time of knowledge in connection with intention. The section says ‘having known at the time when he became possessed of it.’ I thought that counsel for the defence had put too narrow a construction upon it. I was of opinion that it referred to the time of *conscious possession* so far as the accused was concerned, that it need not be the time when the servant received the money. I thought that it referred to the time when the master came to know that the coin had been received. The point to consider was, had the accused fraudulent intention at that point of time *when he became aware of the possession*, became conscious of the possession or had knowledge of it. Such knowledge need not be contemporaneous with the receipt of the coin if the accused did not receive the money; but some one also had received it on his behalf. So to construe, would be to restrict the scope of the section. The essential point was, was the accused fraudulently, or with fraudulent intention, in possession, having known, *at the time he became aware of the possession*, that the coin was counterfeit. That was, I thought, the meaning of the section. The man may not have been present when his servant received it. There was no evidence in this case that he was. I cautioned them more than once that the servant’s knowledge, if any, could not be attributed to the master. I also told them that possession involved the idea of retention.

They had also to consider whether the money was kept in possession with a fraudulent intention, and was such intention formed at the time when the fact of possession *became known to the accused*, if he came to know it at all. I explained why I thought the section difficult to apply."

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I agree with the learned Judge that this section is one which it is difficult to apply, but with great deference to him, I do not think that the construction which he placed upon the section, as indicated in his summing up, is correct.

To constitute an offence under this section it must be proved:—

- (i) that the accused was in possession of the coin;
- (ii) that the coin was counterfeit of the King's coin;
- (iii) that the accused was in such possession fraudulently or with intent to defraud;
- (iv) that at the time he became possessed of such counterfeit coin, he knew it to be counterfeit.

Section 27 of the Indian Penal Code provides that when property is in the possession of a person's wife, clerk, or servant on account of that person, it is in that person's possession within the meaning of this Code and by section 7 of the Indian Penal Code, it is enacted that every expression which is explained in any part of this Code, is used in every part of this Code, in conformity with the explanation.

Consequently, section 243 must be read in view of these two sections, and therefore two kinds of possession may have to be considered in connection with a case under this section, viz., the possession of the accused person himself and the possession of an

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accused person's wife, clerk or servant on account of that person.

In the case now before us, it was alleged by the defence that the counterfeit coins must have been received in the first instance by the servant of the accused, viz., Gunga Sahay, and that they remained in his possession; on the other hand it was urged for the prosecution that the counterfeit coin was found in the locked safe of the accused; that the accused kept the key and the number of counterfeit coins was large and that from such facts it was only reasonable to suppose that the accused was in possession of the coins and that he must have known when he became possessed of them that they were counterfeit. Having regard to the facts and the contentions on this part of the case, in my judgment, a direction should have been given to the Jury to the effect that they should come to a decision, (i) whether the counterfeit coins were in the possession of the accused, or in the possession of his clerk or servant on behalf of the accused; and (ii) if they came to the conclusion that the coins were in the possession of the accused, they would then have to decide whether he knew at the time when he became so possessed of them, that the coins were counterfeit; (iii) if they came to the conclusion that the coins were in the possession of the clerk or servant on behalf of the accused, they would then have to decide whether at the time the clerk or servant on behalf of the accused became possessed of the counterfeit coins, the accused himself knew that they were counterfeit. I do not find that these questions were put either directly or indirectly to the Jury; on the contrary the Jury's attention was directed to a question which was said to be the essential question, viz., whether the accused was fraudulently, or with fraudulent intention, in possession, having

known *at the time he became aware of the possession* that the coin was counterfeit. This was, in my judgment, not a correct direction, and for the reasons given above: and while agreeing with the learned Judge that the section is a difficult one to apply, I must with deference differ from him on the point of construction.

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In view of the above conclusion, it is not necessary to give any opinion as to the second contention as to the alleged omission of the learned Judge to direct the Jury. It was also urged during the course of the argument that the learned Judge ought not to have left the case to the Jury at all, as there was no evidence on which the charge could be supported.

I do not think this really was open to the learned counsel for the accused in view of the terms of the certificate of the Advocate-General; but even if it was open for argument, in my judgment, there was evidence which the learned Judge was bound to leave to the Jury in support of the charge.

In view, however, of the fact that I think there was a misdirection, as already indicated, in a part of the summing up, which related to a material and essential element of the charge, I think the conviction should be set aside. I do not think the facts are so clear that we should be justified in saying that the misdirection has not in fact occasioned a failure of justice.

In my judgment, therefore, the conviction should be set aside.

MOOKERJEE J. This is an application for review of a criminal case on the certificate of the Advocate-General under clause 26 of the Letters Patent. The petitioner Fateh Chand Agarwalla was tried at the third Criminal Sessions of this year on a charge of offences punishable under section 243 of the Indian Penal Code, and, on the unanimous verdict of the jury,

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was convicted and sentenced to undergo rigorous imprisonment. The accused then applied to the Advocate-General and obtained a certificate that "in his judgment, whether the direction to the Jury (hereinbefore specified) was right in law and whether the alleged omissions to direct the Jury do not in law amount to a misdirection should be further considered by the High Court." To determine the points of law, certified by the Advocate-General, it is necessary to give a brief outline of the history of the trial.

The accused is the owner of two flour mills, one in Armenian Street, the other in Hanspukur Road, and carries on considerable business. On the 26th November 1915, Purna Chandra Lahiri, Assistant Commissioner of Police, received information that there were counterfeit coins in the shop of one Soniram Agarwalla in Machua Bazar Street. Lahiri searched the shop that very day, and found 31 spurious coins which bore the year 1898. Soniram gave him certain information, and he raided the shop of the accused in Armenian Street late in the evening between 10-30 and 11 P.M. The case for the prosecution is that they found in an iron safe (the key of which was produced by the accused) 160 counterfeit coins (1898) similar to the 31 coins found in the shop of Soniram. The police further found three counterfeit coins, which bore the year 1901, in a wooden box inside the safe. The 160 coins were found in a bag mixed up with 337 genuine rupees. Inside the safe, there were also 37 genuine rupees and currency notes to the extent of Rs. 1,555. The police took charge of the currency notes (Rs 1,555), the genuine coins (Rs. 374) and the counterfeit coins (Rs. 163). At the time of the search, there were present in the shop, besides the accused, one Ganga Sahay alleged to be his cashier and another man named Chotey Lal, said to be his partner in the

Electric Flour Mill. The case for the defence was that his cashier receives, as a rule, all moneys paid into the shop, that on the day of the incident Ganga Sahay was the cashier, that he himself did not receive the counterfeit coins, that it was quite likely that the coins were included in a payment of Rs. 222 made on that date by Soniram for goods supplied on the 23rd November, and, that, as payments had been made by other persons also on the same date it was impossible to state with certainty how or from whom the spurious rupees were received. In support of the defence, both Gunga Sahay and Chotey Lal were examined, and what purported to be the account books of the firm were also produced. In these circumstances the question arises, whether there was an error of law in the charge to the Jury.

Section 243 of the Indian Penal Code is in these terms: "whoever fraudulently or with intent that fraud may be committed is in possession of counterfeit coin, which is a counterfeit of the Queen's coin, having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine."

To establish that the accused has committed an offence under this section, it must be proved

(i) that the coin in question is a counterfeit of the Queen's coin ;

(ii) that the accused was in possession of it ;

(iii) that he was in possession thereof fraudulently (that is, with intent to defraud), or with intent that fraud might be committed ;

(iv) that at the time that he became so possessed thereof, he knew it to be counterfeit.

The term "possession" has to be interpreted in the light of section 27 which by virtue of section 7 is

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applicable wherever the term is used in the Code. Section 27 which abolishes the distinction recognised in English law between possession and custody, provides as follows:

“When property is in the possession of a person's wife, clerk or servant, on account of that person, it is in that person's possession within the meaning of this Code.”

Consequently, an accused charged under section 243 may be proved to be in possession within the meaning of that section, if he is in possession in either of two modes. namely, (a) he may be in possession of the coin, himself, or (b) he may be in possession, because his wife, clerk or servant is in possession of the coin *on his account*. It is plain that whichever mode of possession is established, it is essential to prove that at the time the accused became possessed of the coin, he knew it to be counterfeit. The vital point of the matter, then, is to determine the precise moment when the accused becomes possessed of the coin in either of the two modes whereby possession may be acquired. If the coin is delivered directly into the hand of the accused, there is no room for controversy that he does, at that moment, become possessed of it, and, in such a case, it is necessary to establish that the accused knows that the coin is counterfeit when it is so delivered to him. When, however, the coin is delivered to the wife, clerk or servant of the accused, a different question arises, a question which may be by no means easy of solution in the circumstances of a particular case. Possession of property by the wife, clerk or servant of a person is, under section 27, his possession, *only if the possession is on his account*. Consequently, when a spurious coin is delivered to the wife, clerk or servant of a person, it does not necessarily follow that he is in possession from that

moment; it must further be shown that the person to whom it has been delivered possesses it on his account. Questions of extreme nicety may, in this connection, arise on the facts of some cases, as may be seen from the decisions in *R. v. Booker* (1) and *Anglo-American Oil Co. v. Manning* (2). There may, on the other hand, arise obviously simple cases, as in *R. v. Weeks* (3). For example, *A* asks a coiner, *B*, to supply him with 100 spurious coins and instructs him to leave them with his servant if he is not at home; as soon as the parcel is delivered to the servant, *A* is in possession of the coins. On the other hand, suppose *B*, a coiner, delivers to the servant of *A*, without the knowledge of *A*, a packet of spurious coins; it cannot be said that *A* is necessarily in possession of the coins from the moment of their delivery to his servant. Consequently, when property is in the possession of a servant, it is essential to determine whether, upon the special facts of the case, it can be said that he is in possession on account of his master. This may be answered in the affirmative, either because, from the very moment when the property comes into the possession of the servant, he was in possession on behalf of his master, or, because, though not in possession on his behalf at that time, he becomes so possessed later on by reason of events subsequent: when this moment of time has been determined, there must be proof that at that moment the accused has knowledge that the coins are counterfeit. In my opinion, the charge in this case should have specified that the first point for the Jury to determine was, whether the coin had been delivered to the accused himself or to his cashier. The charge should further have specified that the second point for determination

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(1) (1850) 4 Cox 272.

(2) [1908] 1 K. B. 536.

(3) (1861) 8 Cox 458.

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by the Jury would depend upon their view of the first question. If they found that the coins had been delivered to the accused himself, they would have to determine whether, when he received the coins, he knew that they were counterfeit; if, on the other hand, they came to the conclusion that the coins were delivered to the cashier, they would have to decide, whether from the moment of such delivery or only from a later period, the possession of the cashier was on account of the accused. They would finally have to decide, whether at the time when the cashier could be said to be in possession *on account of his master*, the master had knowledge that the coins were counterfeit. After a careful perusal of the notes of the charge as drawn up by the learned Judge, I regret I cannot see any escape from the conclusion that the charge involved an error of law, inasmuch as it was based on an erroneous view of the requirements of section 243, specially with reference to the element of time when the accused must be proved to have known that the coins were counterfeit. I may add that I have based my conclusion, not upon the notes supplied by Counsel, but upon the notes of the learned Judge himself, for, as pointed out in a long series of decisions mentioned in the case of *King-Emperor v. Upendra Nath Das* (1), the statement of the Judge who presides at the trial as to what actually took place before him is conclusive. But though the version of the charge, whereupon the certificate of the Advocate-General was granted, differs in certain respects from the substance of the charge as given by the learned Judge, the certificate does, in my opinion, substantially bring out the question in controversy, and it has consequently not been necessary to require an amended certificate, as was done in the case of

(1) (1914) 21 C. L. J. 377 ; 19 C. W. N. 653.

King-Emperor v. Upendra Nath Das (1). There the Court found that the questions sought to be raised on review, were fundamentally different from the points of law specified in the certificate of the Advocate-General. I desire to add further, as the application for review is based on allegations of not only erroneous direction but also non-direction, that, in my opinion, mere non-direction is not necessarily misdirection. The true rule on the subject was enunciated by Lord Alverstone C. J. in *Rex v. Stoddart* (2): "It is no misdirection not to tell the jury every thing which might have been told them. Again, there is no misdirection unless the Judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood".

In the view that there was misdirection in the charge to the Jury, the question arises what course should be pursued. Reference was made on behalf of the Crown to section 537 of the Code of Criminal Procedure, 1898, which provides that no sentence passed by a court of competent jurisdiction shall be reversed or altered under Chapter XXVII (confirmation of sentences of death), or on appeal, or revision, on account of any misdirection in any charge to a Jury, unless such misdirection has in fact occasioned a failure of justice. But section 537 is clearly of no avail. In the first place, the section has no application to a case reviewed under clause 26 of the Letters Patent. The proceeding is not by way of appeal, which is expressly

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(1) (1914) 21 C. L. J. 377 ;

(2) (1909) 2 Cr. App. Rep. 217, 246.

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excluded by clause 25; nor is it in the exercise of revisional jurisdiction, which is created by clause 28; and it is needless to observe that it does not fall within the scope of the Chapter which deals with the confirmation of sentences of death. In the second place, even if section 537 had applied, I would not hesitate to hold, on the facts of this case, that the misdirection had in fact occasioned failure of justice. We must, consequently, consider the scope of the authority of the Court under clause 26 of the Letters Patent.

Mr. Norton contended, on behalf of the accused, that if the Court comes to the conclusion that the Jury were misdirected, there is no option left to the Court but to set aside the conviction and acquit the accused. In support of this argument he relied upon the decision of the Judicial Committee in *Subramania Iyer v. King-Emperor* (1). Mr. Mitter, on behalf of the Crown, contested the validity of this contention as opposed to the settled practice of this Court. The question raised, if it were *res integra*, must be deemed not free from difficulty. Clauses 25 and 26 make it plain that, when a point or points of law have been reserved or have been certified by the Advocate-General as erroneously decided or as worthy of further consideration, the Court has full power and authority "to review the case or such part of it as may be necessary, and finally determine upon such point or points of law, and thereupon to alter the sentence passed by the Court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right." It is obvious that the intention is that the case should be finally decided on review and not remitted for retrial. It has also been ruled that when

(1) (1901) I. L. R. 25 Mad. 61 ; 5 C. W. N. 866.

the Court on review holds on the point of law in favour of the accused, it is competent to the Court to consider the whole case on the evidence and to pass such sentence as shall seem right. The Bombay High Court followed this procedure in the cases of *R. v. Navroji* (1) and *Imperatrix v. Pitambor* (2); in each instance, although the Court decided the question of law in favour of the accused, yet, upon a review of the whole case and an examination of the merits, affirmed the conviction. In this Court, the same procedure was adopted in the cases of *Queen v. Hurribole* (3) and *Queen v. O'Hara* (4); in each instance, the point of law was decided in favour of the accused, but on a review of the whole evidence, while the conviction was affirmed in the former case, it was set aside in the latter instance. The cases of *Queen v. Sib Chandra* (5) and *Emperor v. Upendra Nath Das* (6) do not directly touch the present question, inasmuch as the alleged error of law was not established in either instance. The only question, thus, is, whether the decision of the Judicial Committee in *Subramania Iyer v. King-Emperor* (7) overrules in effect the decisions in *Queen v. Hurribole* (3) and *Queen v. O'Hara* (4). The point is not free from difficulty and deserves much fuller examination than is possible on the arguments addressed to us. The accused, in the case of *Subramania v. King-Emperor* (7), was charged upon an indictment which contained seven counts and was jointly tried with an abettor who was charged with abetment of the offences set out in three of the counts. The accused was convicted and sentenced to undergo

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(1) (1872) 9 Bom. H. C. R. 358.

(5) (1884) I. L. R. 10 Calc. 1079.

(2) (1877) I. L. R. 2 Bom. 61.

(6) (1914) 21 C. L. J. 377 ;

(3) (1876) I. L. R. 1 Calc. 207 ;

19 C. W. N. 653.

25 W. R. (Gr.) 36.

(7) (1901) I. L. R. 25 Mad. 61 ;

(4) (1890) I. L. R. 17 Calc. 642.

5 C. W. N. 866.

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imprisonment and to pay a heavy fine. He then obtained a certificate from the Advocate-General under clause 26 of the Letters Patent, and the points of law were heard by a Full Bench of six Judges. The Judges were equally divided in opinion upon the question whether the first count was bad, but the majority were agreed that whether good or bad, its union with the remaining counts made the whole indictment bad for misjoinder; they held, however, that it was open to them to strike out the first count and to deal with the evidence applicable to the remaining counts. The accused contended that the Court was not competent to deal with the case in this manner, to usurp the functions of the Jury and to substitute in essence the judgment of the Court for the verdict of the Jury. The Court overruled the objection raised as to its jurisdiction to review the case upon the evidence, and the six Judges sat a second time to hear the case on the facts. They examined the evidence, came to the conclusion that the conviction could be sustained on the counts other than the first which they had expunged, and passed sentences on the remaining counts in modification of the original sentence. The accused obtained special leave to appeal to His Majesty in Council. Before the Judicial Committee, the point was pressed that the trial was bad for misjoinder of charges and that the Court had no power, under clause 26 of the Letters Patent, to decide the case on the residue of the evidence. The Judicial Committee came to the conclusion that the trial had been held in contravention of section 234 of the Criminal Procedure Code, inasmuch as the accused was charged in the indictment with no less than 41 acts extending over a period of two years, whereas, under the law, he could be tried only for three such offences of the same kind if

committed within a period of twelve months. Lord Halsbury, L. C., then proceeded to observe as follows: "Their Lordships think that the course pursued, which was plainly illegal, cannot be amended by arranging afterwards what might or might not have been properly submitted to the Jury. Upon the assumption that the trial was illegally conducted, it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported, if the accused had been properly tried. The mischief sought to be avoided by the Statute has been done. The effect of the multitude of charges before the Jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty, only to such parts of the written accusation as ought to have been submitted to the Jury. It would in the first place leave to the Court the functions of the Jury and the accused would never have really been tried at all upon the charge arranged afterwards by the Court. Their Lordships cannot regard this as cured by section 537." In this view, their Lordships did not consider whether the conviction on any of the counts could be supported on the evidence adduced at the trial, and allowed the appeal. On this judgment, Mr. Norton based the contention that, in no circumstances, is the High Court competent, under clause 26, to review the case on the evidence. This raises the question, whether the Judicial Committee intended their observations to be limited to cases of the type then before them, namely, cases where the trial has been conducted in a mode prohibited by law, or in the words of Lord Russell quoted by them, where the proceedings have been constituted in a way not authorised by law and the rules applicable to procedure, or did the Judicial Committee intend to go further and to include in their

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observations cases of the type of *R. v. Navroji* (1), *Queen v. Hurribole* (2) and *Queen v. O'Hara* (3), where evidence has been erroneously received, or cases of the type of *Imperatrix v. Pitambor* (4) where evidence was improperly rejected, or, again, cases of the type of the one now before us, where the error assigned consists in the erroneous exposition of a principle of law or the constituent elements of the offence charged; or did the Judicial Committee intend, in substance, to adopt the rule enunciated by themselves in the earlier case of *Makin v. Attorney-General for New South Wales* (5), where they had emphatically condemned the transference from the Jury to the Court of the determination of the question whether the evidence, that is, what the law regards as evidence, established the guilt of the accused. These are questions not wholly free from difficulty, and, in the absence of full arguments thereon at the Bar, I must reserve my opinion on them. This is rendered possible, because, in my judgment, an examination of the evidence, assuming it to be permissible, shows that the conviction cannot be sustained. There are *lacuna* in the evidence which make it impossible for me to hold that the elements essential for a conviction under section 234 have been established. I do not propose to review the evidence in detail, but I desire to state that upon one fundamental point, namely, who had the key of the iron safe, there is really no contradiction. Lahiri stated that the key was produced by the accused; he does not appear to have been cross-examined upon this point. Gunga Sahay stated that the keys were with him, then when the police came, his master asked for the keys, that he gave them

(1) (1872) 9 Bom. H. C. R. 358.

(3) (1890) I. L. R. 17 Calc. 642.

(2) (1876) I. L. R. 1 Calc. 207 ;

(4) (1877) I. L. R. 2 Bom. 61.

25 W. R. (Cr.) 36.

(5) [1894] A. C. 57.

up and the safe was opened. This witness also does not appear to have been cross-examined on this point. The two statements may obviously be reconciled. If, then, the coins were received by Gunga Sahay as he would seem to assert, and if the keys were with him when the police came, how does the prosecution establish the requisite elements under section 234. The evidence clearly does not prove that the case falls within that section. Much stress was laid on the large number of coins and their appearance, and reference was made to *R. v. Jarvis* (1), where *R. v. Fuller* (2) was followed. These cases are of no assistance to the Crown, in the absence of evidence, direct or circumstantial, to show that the accused had seen the coins or had even been aware of their existence in the safe before the police raided his shop. I also find from the notes of evidence that on behalf of the Crown the suggestion was made to two of the defence witnesses, Gunga Sahay and Chotey Lal, that there was an agreement between the accused and Soniram to pass counterfeit coins at a profit. In my opinion, this was calculated to prejudice the accused and was obviously unfair to him, if there was no basis for the suggestion; if, on the other hand, the suggestion was well-founded in fact, the Crown should have adduced the evidence at their disposal. It has been repeatedly ruled that the duty of the prosecution is, not to secure a conviction, but to assist the Court in arriving at the truth, and for that purpose to place before the Court all the material evidence at its disposal: *Ramranjan v. King-Emperor* (3), *Amrit Lal v. King-Emperor* (4), *Emperor v. Nagendra* (5). On an examination of the

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(1) (1855) 7 Cox 53;

Dears. C. C. 552.

(2) (1816) Russ. & R. 308.

(3) (1914) 19 C. W. N. 28.

(4) (1915) 19 C. W. N. 676;

21 C. L. J. 331.

(5) (1915) 19 C. W. N. 923;

21 C. L. J. 396.

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whole evidence, my conclusion is that the conviction cannot be sustained.

In my judgment, this application must be granted and the conviction and sentence set aside.

FLETCHER J. The only matters that have been certified by the Advocate-General in this case are, first, whether the direction set out in paragraph 7 of petition for review was right in law; secondly, whether the matter set out in paragraph 9 of the same petition vitiated the trial, and, thirdly, whether the alleged omissions to direct the Jury on the matters referred to in paragraph 8 of such petition, amounted to misdirection. The second and third heads may be shortly disposed of. The second head does not represent what in fact took place at the trial. The third head has not been argued before us. We are, therefore, left to deal with the first head, namely, the alleged misdirection set out in paragraph 7 of the petition for review.

The two charges on which the accused was tried were framed under section 243 of the Indian Penal Code, namely, of being in possession of certain counterfeit coins with intent to utter the same, the accused having known at the time he became possessed of the same that they were counterfeit. The case set up by the prosecution was as follows :—On the 26th of November last on a search by the police at a shop at Machua Bazar Street, Calcutta, belonging to one Soniram Agarwalla 31 counterfeit (1898) rupees and other base coins were found, Sonairam was arrested. Acting on certain information received from Soniram the police at about 10-30 or 11 P. M. the same night raided the premises of the accused and found in an iron safe, the key of which was produced by the accused and opened by him, 160 counterfeit (1898) rupees similar to the 31 counterfeit rupees found

in the shop of Soniram. The police also found 3 counterfeit (1901) rupees in a wooden box inside the safe, the key of which box was also produced by the accused.

The 160 counterfeit (1898) rupees were found in the safe inside a bag mixed up with 337 genuine rupees. Thirty-seven other genuine rupees and currency notes for Rs. 1,555 were also found in the safe.

Now, if the case had stopped there, the Jury could obviously have found that the accused had committed the offences with which he was charged. The possession of so large a number as 160 counterfeit rupees all bearing the same date and appearing as if they had recently been issued from the mint, are facts from which the Jury might well have inferred, in the absence of any explanation by the accused, that the accused must have known that, at the time he became possessed of the same that they were counterfeit and that the accused could not be in possession of such a large number of counterfeit rupees except fraudulently or with intent that fraud might be committed. The accused, however, called evidence in support of his defence.

The principal witness was one Gunga Sahay said to be the cashier of the accused's firm and so acting in November last. His evidence was to the effect that he received moneys and made payments on account of the accused's firm and that he never received any counterfeit rupees to his knowledge. He also produced certain books of account alleged to be the books of the accused's firm showing the payment on the 26th of November last of the sum of Rs. 222 by Soniram to the accused's firm on account of certain goods sold and delivered.

Now, it seems to me obvious that counsel for the defence in his address to the Jury had argued that

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even if the Jury came to the conclusion on the evidence that at the time the accused obtained physical possession of the counterfeit rupees he knew that they were counterfeit, no offence had been committed under section 243 of the Indian Penal Code, because the evidence called by the defence proved or strongly suggested that moneys paid to the firm were received by the cashier Gunga Sahay. It seems to have been argued that under the provisions of section 27 of the Indian Penal Code the possession of Gunga Sahay was the possession of the accused, and as the accused would not at the very instant become aware of any payments made to his cashier, he would not in the ordinary course know, at the time he became possessed of the counterfeit rupees, that they were counterfeit. In dealing with this argument the learned Judge gave the direction to the Jury that is complained of.

If the direction had been in the terms set out in paragraph 7 of the petition for review, it would clearly have been a misdirection. The learned Judge has, however, furnished us with a note of his charge to the Jury and the portion dealing with the argument before mentioned is as follows:—"The section says 'having known at the time he became possessed of it,' I thought that counsel for the defence had put too narrow a construction upon it. It was of opinion that it referred to the time of conscious possession so far as the accused was concerned, that it need not be the time when the servant received the money. I thought that it referred to the time when the master ~~knew~~ that the coin had been received. The point to consider was, had the accused the fraudulent intention at the point of time when he became aware of the possession, became conscious of the possession, or had knowledge of it. Such knowledge need not be contemporaneous with the receipt of the coin if the

accused did not receive the money, but some one else had received it on his behalf." I venture to think that that was a proper direction of the learned Judge to give to the Jury in the circumstances of the case. The cashier Gunga Sahay was put forward presumably as a witness of truth, and it must be taken in accordance with his evidence that he had no knowledge of the receipt of the counterfeit rupees. If the cashier Gunga Sahay had no authority to receive counterfeit coin on behalf of the accused and did not in fact know that he had received them would the fact that the counterfeit coins had passed through the hands of Gunga Sahay to the accused prevent the accused, if the other elements necessary to prove the offence were present, from being convicted of an offence under section 243 of the Indian Penal Code? In my opinion it would not. No doubt under the provisions of section 27 of the Indian Penal Code when property is in possession of a person's wife, clerk or servant on account of that person, it is in the person's possession within the meaning of the Code. But not every possession of a person's wife, clerk or servant is his possession, it must be possession on account of that person. For instance, possession by a housemaid of stolen property is not the possession of her master unless the housemaid has been authorised to receive it, or her possession has been ratified, as the receipt of stolen property is not within the scope of a housemaid's authority.

In the present case, it is not suggested that Gunga Sahay had authority to receive counterfeit rupees on behalf of the accused. His possession was not, therefore, I think, on account of the accused, and the learned Judge, I think, correctly directed the Jury that the point of time they had to look at, in the circumstances of the case, was the time when the accused had actual or, as the Judge calls it. conscious possession of the

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counterfeit coins for determining whether he had knowledge at that time that the coins were spurious. In my opinion, therefore, the direction of the learned Judge, to which the Advocate-General's certificate relates, was correct. The application for review ought, I think, to be refused.

The majority of the Bench, however, are, I understand, of a contrary opinion, and in that view of the case it becomes necessary to consider whether in a review we should affirm the conviction and sentence. The verdict of the Jury in accordance with the opinion of the majority of the Bench not being a verdict arrived at after proper directions as to the law, we have to review the evidence without having the benefit of an opinion, which we can act on, of the Court which saw the witnesses give their evidence, and observed their demeanour. In that view, I think, with evidence both on the side of the prosecution and the defence, we cannot say that the defence evidence is so palpably false that a conviction ought to take place.

In view of the fact that the majority of the Bench are of opinion that there was a misdirection by the learned Judge, I agree that conviction and sentence ought to be set aside.

TEUNON J. In this case the petitioner before us one Fateh Chand Agarwalla has been convicted on two charges under section 243 of the Indian Penal Code. The conviction was heard on the 7th July 1916 at the Criminal Sessions holden in this Court and the matter comes before us on a certificate granted by the learned Advocate-General under the provisions of section 26 of the Letters Patent.

The case for the prosecution was that at about 11 P.M., on the 26th November 1915 the business premises of the accused were searched by an Assistant

Commissioner of Police, who, in a safe, the key of which was produced by the accused, found 160 counterfeit rupees bearing date 1898 and three counterfeit rupees bearing date 1901. The 160 were in a bag mixed up with 337 good rupees and the three bearing date 1901 were in a wooden box in which it appears there were also 37 good rupees, though in this case the good and the bad were not mixed together.

The first count or charge on which the accused has been convicted referred to the 160 rupees bearing date 1898, and the second charge or count to the three bearing date 1901.

In the safe were also found currency notes aggregating Rs. 1,555 in value and small coins to the value of some Rs. 200.

It was the further case for the prosecution that at a search of the shop or business premises of another trader named Soniram Agarwalla made by the same Assistant Commissioner of Police 1½ hours earlier, 31 counterfeit rupees were found, and that it was on information received from Soniram that the search officer proceeded to the premises of this petitioner. In fact the 31 counterfeit coins found at Soniram's were similar to the 160 found in the petitioner's safe and all appear to be from the same die.

The prosecution rested its case on the possession by the accused of this large number of counterfeit coins and left it to the accused to rebut the presumption thereby created.

The accused did not deny that the coins were found in his safe, but pointed out that as the owner of two flour mills he did a considerable business and that for the receipt and payment of moneys he employed a cashier by whom monies received were placed in the safe. He also alleged that in the course of the 26th November a payment of Rs. 222 had been made by the

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very Soniram in whose possession similar counterfeit coins had been found. In short he denied all personal knowledge of the existence of base coins in his safe and alleged the possibility of a fraud practised upon his cashier by Soniram.

In support of his defence the accused examined his cashier Gunga Sahay and a second witness Chotey Lal said to be his partner. These witnesses speak of the duties of the cashier, of the extent of the business, of the firm's dealings with Soniram and of the transaction with the latter on the 26th. The cashier also explained how he tested the coins offered to him.

From the learned Judge's charge to the Jury it would seem that he was satisfied that the accused did in fact carry on an honest business on a considerable scale, and that in this business money came in and went out daily. He appears also to have been satisfied that in the ordinary course of business the money now in question would have been taken in by the cashier and he pointed out to the Jury that it did not appear that the accused was present when the coin was received.

It is impossible for us to say what view was taken by the Jury of any particular portion of the evidence, but from their verdict it is clear that they were satisfied that the accused had knowledge of the spurious character of the coins, and intended to make a fraudulent use of them.

But in order to a conviction under section 243 of the Code the law requires that the accused should have this knowledge that the coin in question is counterfeit "at the time when he became possessed of it."

If we could take it that the Jury had found that the accused had himself received the money from his customer or customers, the case would present no difficulty. The difficulty is caused by the interposition or

possible interposition of the cashier. By virtue of section 27 of the Code the possession of the cashier on account of his master is the master's possession. Now on this aspect of the case the learned Judge directed the Jury to the effect that if the money had in fact been received by the cashier the requirements of the section would be satisfied if the Jury found that the accused had knowledge of the spurious character of the coin when he "became aware" that the coin had been received or "became conscious" of his possession, that is to say, the Jury were directed that if the receipt by the cashier on the account and for the use of the accused and the accused's knowledge of the receipt were not contemporaneous, the Jury should have regard not to the time of receipt but to the later point of time when the accused's unwitting possession became conscious possession.

With all respect I am unable to agree in this interpretation of the section.

In the case of an employer doing a large business such knowledge or consciousness might be deferred for days. During those days for all other purposes, for instance, for the purposes of the sections relating to theft, the coins are to be treated as in the employer's possession, for the purposes of the section under consideration they are in this view not to be so regarded: for this purpose, the employer's possession is to be deferred until he has seen them or been otherwise informed of their true character. But this appears to be contrary to the provisions of section 7 which requires us to give to the expression "possession" the same sense or value in all parts of the Code.

It has been contended that "conscious retention" is implied or is a necessary element in all possession. In so far as that may be so, it would seem that in cases where possession is held or obtained through a

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servant, the law makes the conscious retention of the servant on the master's account supply the place of the conscious retention of the employer. It is of course otherwise with the knowledge of the base character of the coin. Such knowledge must be personal.

It has also been urged that to place upon the section the interpretation which I do is unduly to restrict its scope and make it extremely difficult of application in the case of shopkeepers, traders or businessmen. I am not pressed by that argument. I can see no reason on principle why the employer, whose cashier has received bad coin otherwise than in conspiracy with him, should be placed in a worse position than the unwary person upon whom bad coin has been passed. In any case if there is a defect in the law the remedy is with the Legislature.

In the view I take, reading the verdict with the charge, it cannot, I think, be held that the Jury have found that the accused knew of the spurious character of the coin in question when he first came into possession of or originally obtained it.

That being so, we have to consider the case on the merits.

The takings in the accused's business appear to average Rs. 1,000 a day and it appears to be fairly clear that in ordinary course, the coins in question would have been received by the cashier. It was apparently not seriously suggested in the trial court that the accused and his cashier were engaged in a conspiracy for the object of uttering base coins. If the 160 coins bearing the date 1898 were in fact received from Soniram on the 26th, it is not clear that the accused must have seen them as it would seem that the practice is that the accounts are made up in the morning. The coins are fresh and this taken with their number

should possibly have excited suspicion. Apart from this these coins are remarkably good imitations, there is no difference in size, the difference in sound and weight is not noticeable, and it is only when the coins come to be examined that the differences in the milling, lettering and effigy, are observed.

On the whole, though the case is one of grave suspicion, the accused is, I think, entitled to the benefit of doubt.

I should, therefore, acquit him and direct that his bail-bond be discharged.

CHAUDHURI J. I am of opinion that I correctly interpreted the meaning of section 243 of the Indian Penal Code to the Jury. My note deals with the points raised in the certificate of the Advocate-General, but it may be taken as practically containing the whole of my charge. It sets out my view of the law, but I shall add a few comments on the points discussed before us.

Section 27 of the Indian Penal Code lays down that when property is in the possession of a servant on account of his master, it is in the master's possession. Section 7 says that every expression which is explained in any part of the Code, is used in every part of the Code in conformity with the explanation. Therefore, "in possession" throughout the Code includes the servant's possession on account of the master, as the master's possession. There is, however, a clear distinction in law between "custody" and "possession." Custody means possession on account of another. A person in possession of his property is not in custody of it, but a servant is, when he holds the property on behalf of his master. Although such possession of the servant is the master's possession, the possession of the master cannot always be said to

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be that of the servant, though he may be in charge. Let us take section 266 of the Indian Penal Code. It seems to me that the words "in possession" there, do not apply to a servant in charge of his master's shop, in the master's absence. Learned Counsel for the defence agreed with that view. In England it has been held not to apply to that case: *Smith v. Webb* (1).

In the Penal Code different expressions have been used in different places, which indicate that a distinction between "being in possession" and "becoming possessed" was intended. Sections 239 and 241 may be referred to in this connection. Section 239 deals with the case of a person "having" any counterfeit coin, "which at the time he became possessed of it, he knew to be counterfeit, delivering the same to any person fraudulently." This section has been held not to apply to a coiner, who manufactures counterfeit coin. He *has it*, or in other words he is in possession of it, and although he may have intended fraudulent use with it, he is not liable, having regard to the words used in the section "which at the time he became possessed of": see *Queen v. Sheobux* (2). Section 241 deals with the time when the person charged "took it into his possession."

The Penal Code has not used the expression "custody" in dealing with the servant's possession on behalf of the master, but it is quite another thing to say that the distinction in law between "custody" and "possession" has been wiped out by the Penal Code. Confusion has resulted from the two ideas being thus mixed up in section 27. It is interesting to note that Mr. Norton, Senior, objected to clauses 17 and 18 (the original sections corresponding to section 27) when the Code was under discussion, as it did not

(1) (1896) 12 T. R. 450.

(2) (1871) 3 N. W. P. H. C. R. 150.

contain the words "*with the consent and knowledge of the husband or master.*" The Law Commissioners, although they made some alterations which do not affect this point, thought the objection would have weight, if such constructive possession could be charged against the party possessing, as a criminal possession, in order to bring him within the definition of any offence, and to render him liable to a penal prosecution, but said that they were not aware that the clauses in question were capable of being so perverted under the provisions of the Code. (See section 83. The first report of the Law Commissioners.)

We are bound to interpret the expression "in possession" according to section 27, but there is nothing in the Code which lays down that section 27 must be used to interpret the expression "become possessed." It seems clear to me that section 27 does not express the complete thought of the Legislature, on the question of possession and it is competent to us to interpret the words "to become possessed" in accordance to the meaning that the general law has given to them. [See the observations of Holloway J. in *Re Proceedings*, 22nd December 1860 (1)]. When a servant takes possession on behalf of his master, it does not necessarily follow that it is the master who takes possession. Suppose the servant takes wrongful possession, purporting to do so on behalf of his master does the master become liable? The master is not liable in civil law, for acts wholly outside the servant's authority. He is not answerable if the servant takes upon himself, though in good faith, and meaning to further the master's interest, that which the master has no right to do, even if the facts were as the servant thinks them to be: *Poulton v. L. and S. W. Ry. Co.* (2). Much less can the master be held to be

(1) (1866) 3 Mad. H. C. R. App. xi. (2) (1867) L. R. 2 Q. B. 534.

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criminally liable in those circumstances. It would be "to pervert the meaning of the expression." to use the phrase of the Law Commissioners, to put such a construction in a penal statute. Possession in law is that of the master. The servant does not become possessed, although he may be in custody, or "in possession." Dishonest removal of money from the master's safe in which it has been kept by the servant, is removal from the master's possession. It is theft of the master's property, not that of the servant. If the servant dishonestly removes the money from the safe, after having kept the money there, he may be guilty of theft, or of criminal breach of trust, according to circumstances. Possession involves the idea of proprietorship, the right to exercise power or control over the object possessed, *animus sibi habendi*. "Becoming possessed" of property involves the intention to possess (*animus possidendi*). A person picks up a coin in his shop dropped by a customer, and puts it into his till with the intention of restoring it to the customer, but he does not thereby become possessed, although he is "in possession". The master becomes possessed, when he personally takes possession on his own account, or when he authorises the servant to take a thing for him, for his benefit, or on his account, or when he consents to, or sanctions the retention of the thing received by the servant, or knowingly allows the servant to remain in custody for him. If there be prior authority to the servant, or arrangement with him to receive, the time when the servant receives, is the time when the master becomes possessed. In other cases, the time when the master comes to know or consents, or allows the thing to remain with the servant, is the time when he becomes possessed. The master, for purposes of section 243, may be in possession in two

ways, personally, or constructively through a servant, but the time when he becomes possessed, is, I have endeavoured to explain as above, in other words, when it can be held that he was conscious of his possession. I hold therefore that the law was correctly put before the Jury. Since there was no evidence in this case of any prior authority given to the servant, or of any arrangement with him to receive the counterfeit coin, it was unnecessary to deal with the time of the servant's receipt. The accused produced the key of the safe and it was opened by him. It was all important to find, if he had at all come to know that the counterfeit coin was there. The attention of the Jury was prominently called to the point. If they found that as a fact they were asked to consider whether he knew at the time he became conscious of such possession. This became necessary having regard to the reading of the section by the defence.

It follows, that I hold, we cannot interfere with their verdict. I think it right to add, as the facts of the case have been discussed before us, that I would not have convicted him if I had tried the case independently of a Jury.

G. S.

Accused acquitted.

Solicitor for the accused : *P. N. Sen.*

Solicitor for the Crown : *J. T. Hume.*

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PRIVY COUNCIL.

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Nov. 9, 10.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Sale in Execution of Decree—Decree against father of joint mitakshara family—Suit by sons the other members of the family to have it declared that their shares were not affected by the sale under mortgage decree—“Right, title and interest” of judgment-debtor—Substance and not technicalities of transaction to be regarded in cases of this kind.

In execution of a mortgage decree against the father of a joint mitakshara family who alone was a party to the mortgage, the decree and the execution proceedings, his two sons, the other members of the family, objected that only one-third of a patni taluk forming the joint family property could be sold, on the allegation that the debts in respect of which the decree had been made were contracted for illegal and immoral purposes, and the order for sale was amended by adding the words “right, title and interest” of the judgment-debtor as indicating what was to be sold, which expression the Court said was not calculated to affect the case of either party. The property was sold and purchased by the decree-holder. In a suit by the sons to have it declared that only one-third of the property passed by the sale, both Courts in India found that the debts were for legal and necessary purposes. The Subordinate Judge made a decree in the plaintiffs’ favour which was reversed by the High Court on appeal.

Held (affirming the decision of the High Court), that the proper construction of the order for sale, as amended, was that, if the plaintiffs succeeded in establishing that the debts had been incurred for immoral purposes, only one-third of the property would be affected by the sale, while if they failed in that contention the whole of the property would be held to have passed by the sale. The expression “right, title and interest” did not limit what was to be sold to a one-third share.

* *Present* : THE LORD CHANCELLOR (LORD BUCKMASTER), LORD ATKINSON, LORD WRENBURY AND MR. AMEER ALI.

In cases of this kind the substance, and not the mere technicalities of the transaction, should be regarded.

Mahabir Pershad v. Moheswar Nath Sahai (1) followed.

APPEAL No. 111 of 1915 from a judgment and decree (3rd February 1911) of the High Court at Calcutta. which reversed a judgment and two decrees (14th May 1909) of the second Subordinate Judge of Burdwan.

The plaintiffs were the appellants to his Majesty in Council.

The facts leading up to the suit which gave rise to this appeal were as follows :—

In 1881 to 1885 the predecessor in title of Maharajah Sir Prodyot Kumar Tagore, the first respondent, leased certain valuable properties in patni to Lachmipat Singh, the grandfather of the present appellants, in the name of his wife Jarao Kumari, the respondent No. 4. Lachmipat Singh died in 1886, and was succeeded by his only son Chattrapat Singh, and in 1905 the patni right was attached and was about to be sold in execution of two money decrees against Chattrapat Singh at the instance of the decree-holder Benimadhab Das (whose representatives and successors form the third group of respondents in this appeal) in suits to which the appellants were not parties.

Sripat Singh Dugar and Jagatpat Singh Dugar (the appellants) the sons of Chattrapat Singh brought two suits against Benimadhab Doss in the Court of the Subordinate Judge of Hooghly claiming that they and their father formed a joint family governed by the mitakshara law; that the patni was not the exclusive property of Chattrapat, but was ancestral property of the joint family; and praying (*inter alia*) for a declaration of their rights and for an injunction restraining Benimadhab from selling their shares in the patni. A temporary injunction was issued but, on Benimadhab

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Doss' application, it was withdrawn, the decree-holders stating that the patni belonged solely to Chattrapat, and his sons had no interest in it whatever; and after hearing arguments the Court on 13th August 1904 discharged the injunction, but ordered that only the "right, title and interest" of Chattrapat should be sold. The sale proclamation was altered in accordance with that order, the Subordinate Judge holding that the insertion of the expression "right, title and interest" was not calculated to affect the case of either party, and on 17th April 1905 the property (alleged to be of the value of a lakh of rupees) was put up for sale and purchased by Benimadhab Doss for Rs. 25,000, and the suits by the appellants were not proceeded with.

On 15th May 1905, the patni was put up for sale for default in payment of rent under the Patni Regulation VIII of 1819 and was purchased by the predecessor of Sir Prodyot Kumar Tagore, the first respondent, in the benami name of one Manmathanath Bose.

The suits which gave rise to this appeal were then instituted—Suit 333 of 1905, on 3rd July 1905, was brought by Chattrapat Singh, and his two sons against the predecessor of Sir Prodyot Kumar Tagore and his benamidar Manmathanath Bose, Jarao Kumari, respondent 4, and Benimadhab Doss, in which the plaintiffs (appellants) claimed that they were the joint owners of the patni as an undivided Mitakshara family of which their father Chattrapat was the Karta and Manager and contended that Benimadhab Doss had acquired no title to the patni taluk by his purchase in consequence of the fact that the sale under Regulation VIII of 1819 had preceded the confirmation of the sale in execution; that the debts in respect of which Benimadhab Doss had obtained the decrees, had not been contracted for any legal necessity of the joint

family, but for illegal and immoral purposes of the plaintiff Chattrapat; that therefore the appellants (plaintiffs 2 and 3) were not bound by the decrees; and that as against them the sale was wholly null and void and inoperative as to two-thirds of the property. It was prayed (*inter alia*) that the sale under Regulation VIII of 1819 should be set aside, that the rights and possession of all the plaintiffs should be confirmed in the patni taluk, but that if it be held that the right of Chattrapat Singh was extinguished by the sale in execution to Benimadhab Doss the Court should under the circumstances stated in the plaint hold that the appellants were entitled to two-thirds of the same.

Benimadhab Doss in defence alleged that the patni taluk had been owned and possessed by Chattrapat Singh and that Jarao Kumari was a mere benamidar. The appellants (plaintiffs 2 and 3), he asserted, had no title to the patni taluk; that their allegations as to the debt having been contracted for immoral or illegal purposes, were untrue; that the money had in fact been borrowed by Chattrapat Singh for legal necessity, and for the benefit of the joint family; and that consequently all the plaintiffs were bound by the debts and decrees.

Suit 396 of 1906 was brought on 17th July 1906 by Benimadhab Doss against the predecessor of Sir Prodyot Kumar Tagore, his benamidar Manmathanath Bose, Jarao Kumari and Chattrapat Singh, in which the plaintiff claimed to be the owner of the whole patni by virtue of his purchase on 17th April 1905, on the ground that at the time of the sale Chattrapat was the exclusive owner thereof, and prayed that the sale under Regulation VIII of 1819 might be set aside, and for possession and other relief.

Chattrapat Singh in defence contended that Benimadhab Doss had acquired no right to the patni by

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his purchase, but that in any case his sons not having been parties to the execution cases or decrees were not bound by them, and that their rights and interests were not extinguished by the sale.

Issues of which the following only are now material were raised on the pleadings. In suit 333, (6) are the plaintiffs governed by the Mitakshara school of Hindu law? Have the plaintiffs acquired any right to the property in dispute after the death of Rai Latchmipat Singh Bahadur? and (13) did the defendant 4 (Benimadhab Doss) acquire any valid title to the disputed patni by virtue of his auction-purchase in execution of his decrees against the plaintiff Chattrapat Singh? Is his purchase binding on the plaintiffs 2 and 3 (the present appellants)? In suit 396, (3) Has the plaintiff (Benimadhab Doss) got any right to the patni in suit by his alleged purchase, and has he got any cause of action and right to sue?

The Subordinate Judge held in suit 333 of 1905, that Jarao Kumari was a mere benamidar; that the family was a joint Hindu one governed by the mitakshara law; that as such Chattrapat Singh and his sons had joint right in the patni; that Chattrapat Singh was the Karta and Manager on behalf of the joint family; that the debts on which the decrees in question were founded were for valid and legal necessities, and binding upon the joint family; that the patni taluk would have been liable to sale in execution under the decrees and that such sale would have bound the sons of Chattrapat Singh. But he further held, on the construction of the order of 13th August 1904, that in fact the whole patni taluk had not been sold, but only the undivided interest and share of Chattrapat Singh. The Subordinate Judge therefore held that only the undivided share of Chattrapat Singh passed by the sale, and the purchaser

only acquired the right of Chattrapat to compel a partition against his co-sharers.

In suit 333, therefore, he made a decree in favour of the present appellants in respect of their shares, and in suit 396 a decree declaring Benimadhab to be the owner of Chattrapat's undivided share, and entitled to obtain partition of it.

Both Benimadhab Doss and Sir Prodyot Kumar Tagore appealed to the High Court against both decrees, and the four appeals were all heard together. The High Court (WOODROFFE and CARNDUFF JJ.) dismissed the appeals brought by Sir Prodyot Kumar Tagore and no further question arises as to them.

In Benimadhab's appeals the High Court affirmed the finding of the Subordinate Judge that Jarao Kumari was merely a benamidar; that Chattrapat Singh was the managing member of the joint family, which was governed by the mitakshara law; and that the moneys for which Benimadhab obtained his decree were borrowed by Chattrapat Singh as managing member for the purposes and benefit of the joint family. It held that the decree-holder and the Court executing the decree intended to sell the whole patni taluk, and the Court did sell it; and that the price paid by the purchaser at the sale for the whole patni was, having regard to the incumbrances and liabilities upon the property, an excess price rather than a low one. It further held that in the suit against Chattrapat Singh for the debt, he was sued as head of the family; that the debt was one for which the sons were liable; that they had failed to establish their case that the debt was for an illegal or immoral purpose; that Chattrapat Singh had power to dispose of his sons' interest for a proper purpose, and that the whole patni taluk had been sold to Benimadhab Doss and he was entitled to possession of it.

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Both appeals were accordingly decreed, the decrees of the Subordinate Judge being set aside.

On this appeal by the sons of Chattrapat Singh Srish Chunder Mukerji and Sarat Chandra Mukerji, were made respondents as being assignees of all the rights and interests of Benimadhab Doss in the patni taluk under his purchase.

De Grayther, K. C., and *Sir William Garth*, for the appellants, contended that having regard to all the circumstances of the case, and on the true construction of the order of the Subordinate Judge of 13th August 1904, the proclamation of sale, and the sale certificate in the execution proceedings, only the "right, title and interest" of Chattrapat was intended to be, and was, sold, and the sale was not intended to, and did not, pass the shares of the appellants in the patni taluk. Any alienation made by a member of the joint family could not be effective to a purchaser in execution without a partition of the property. If it appears that what was sold was not the entire joint family property, but only the "right, title and interest" of a particular member, the latter only would be held to have passed at the sale. Reference was made to *Dzendyal Lal v. Jugdeep Narain Singh* (1), *Hardey Narain Sihu v. Ruder Perakash Misser* (2), and *Simbhunath Pande v. Golap Singh* (3). Here Chattrapat Singh alone was a party to the mortgage, the execution proceedings, and the decrees, and when objection was taken to the whole property being sold, including the interests of the appellants, the sale proclamation was altered so as to include only the "right, title and interest" of the judgment-debtor

- (1) (1877) I. L. R. 3 Calc. 198 ; (2) (1883) I. L. R. 10 Calc. 626 ;
L. R. 4 I. A. 247. L. R. 11 I. A. 26.
(3) (1887) I. L. R. 14 Calc. 572 ; L. R. 14 I. A. 77.

Chattrapat Singh, and that is what was sold by the Court. The purchaser Benimadhab Doss understood that that alone was sold; in fact he denied that the appellants had any share in the property, but it has been found that they have. The decision of the Subordinate Judge was correct, and should be restored.

Sir R. Finlay, K. C., and A. M. Dunne, for the respondents, contended that the whole of the patni taluk was intended to be, and was, put up for sale in execution of Benimadhab's decree. To contend that only the interest which Chattrapat Singh would have taken on a partition was to raise a new case, which was not set up in the pleadings, and one which is inconsistent with the case there put forward, which was that the debt was contracted for illegal and immoral purposes. The case now made should not have been permitted to be raised. Beyond all questions Chattrapat Singh had power at the time of the mortgage transaction and proceedings in execution to bind the whole of the property. The only circumstance that could have prevented him from exercising that power was the debts being of an immoral nature. But here there is no proof of their being for other than legal and necessary purposes: both the Courts in India have found that that is the case, and they are therefore binding on all the members of the joint-family. In execution proceedings the Court will look at the substance of the transaction, not at technicalities. Reference was made to *Mahabir Pershad v. Moheswar Nath Sahi* (1) and *Bissessur Lal Sahoo v. Luchmessur Singh* (2). The whole property passed under the words "right, title and interest" of the judgment-debtor. Those words were inserted merely to ensure that the appellants should not be prejudiced by

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(1) (1889) I. L. R. 17 Cal. 584; (2) (1879) L. R. 6 I. A. 233.

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the sale if their suit succeeded on the merits but it has failed. An examination of the circumstances of the sale in execution of this decree, and the reasons for altering the proclamation of sale showed clearly that it was intended and understood that the whole property was to be sold, and was sold, by the Court: and any rights which the appellants had passed by the sale

De Gruyther, K. C., in reply. Benimadhab's contention was that the joint family was governed by the Dayabhaga law, whilst Chattrapat alleged the mitakshara was applicable. The injunction was withdrawn as in any case Chattrapat was entitled to a share. As long as his interest only was sold, the parties made no objection.

The judgment of their Lordships was delivered by

Nov. 10.

THE LORD CHANCELLOR. The point to be decided in this case is extremely simple, and it is this: What was the extent of the estate that passed on the sale, under a decree of the Court of the 13th August, 1904, of "the right, title, and interest" of a judgment-debtor of certain property? There is no doubt whatever that all parties considered that the entire estate had been sold under the order. The price was based upon that hypothesis, and the present appellants were so much impressed with this view that they instituted proceedings for the purpose of obtaining a declaration, that in the special circumstances of the case only one-third was properly liable to attachment. The grounds for that action were these: The property in question was joint property, governed by the Mitakshara law. By that law a judgment against the father of the family cannot be executed against the whole of the Mitakshara property, if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In

every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone. In the proceedings so instituted the plaintiffs accordingly alleged that the consideration for the debt was illegal and immoral, and on this allegation obtained an *ex parte* injunction restraining the sale of the whole of the estate which was then admittedly the subject of advertisement, and a formal application was subsequently made, asking that the injunction might be continued. Upon the hearing of that application it was urged by the appellants that their case as to the illegality and immorality of the consideration for the debt being still under consideration, the Judge ought to suspend proceedings under the execution decree until that point had been determined, and upon this application the order was made which has given rise to the dispute. The appellants were quite willing that the order should be amended by adding the words "right, title, and interest," and to this request the learned Judge acceded. The words so used are undoubtedly ambiguous [*Simbhunath Pande v. Golap Singh* (1)] and lend colour to the contention that they only cover the actual third which the judgment-debtor possessed in his own right, and leave unaffected the two-thirds which, though capable of being bound by the order, were not in fact the property of the debtor at all. It therefore becomes necessary to examine the facts and circumstances which led to their introduction [*Mahabir Pershad v. Moheswar Nath Sahai* (2).] The learned Judge stated this reason in plain language. He said that the addition of those words would not be calculated to affect the case

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(1) (1887) I. L. R. 14 Calc. 572 ; (2) (1889) I. L. R. 17 Calc. 584 ;
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of either party, and upon that footing they were introduced.

Now there is only one hypothesis upon which the introduction of those words could have left the rights of either party unaffected, and that is, by so construing the order that if the plaintiffs succeeded in establishing that the debt had been incurred for immoral purposes, only one-third would be affected by the decree, while if they failed in that contention, as was ultimately the case, the whole of the estate would remain subject to the order for sale.

That, in their Lordships' opinion, is what the order meant, and had it effected anything else the result would have been that, without any reason at all, the Judge would have deprived the execution creditor of the undoubted right that he possessed, except upon the happening of one event, which, in the result, has never arisen, to sell the entirety of the estate.

Their Lordships are in entire agreement with the view expressed in the case of *Mahabir Pershad v. Moheswar Nath Sahai* (1) to which Sir Robert Finlay called their attention, that in cases of this kind it is of the utmost importance that the substance, and not the mere technicalities, of the transaction should be regarded.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed, with costs to the respondents who appeared.

Appeal dismissed.

Solicitor for the appellants : *G. C. Farr.*

Solicitors for the Mukerji respondents : *Vallance & Vallance.*

J. V. W.

(1) (1889) I. L. R. 17 Calc. 534 ; L. R. 17 I. A. 11.

PRIVY COUNCIL.

CHHATRAPAT SINGH DUGAR

v.

KHARAG SINGH LACHMIRAM.

P.C.^o
1916March 14;
Nov. 1, 20.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

*Insolvency—Provincial Insolvency Act (III of 1907), ss. 5, 6, 15 and 16—
Petition by debtor—Debtor's right to order of adjudication where all the
requirements of the Act have been fulfilled—Dismissal of petition as
"an abuse of process of Court" a matter to be dealt with on application
for discharge.*

On an application under the Provincial Insolvency Act (III of 1907) by a debtor to be declared an insolvent where all the conditions specified in the Act have admittedly been satisfied, he is entitled to an order of adjudication. This does not depend on the discretion of the Court, but is a statutory right of which he cannot be deprived by the Court on the ground that his petition is "an abuse of the process of the Court." To this effect there is a current of authority in India that the stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the Court, and not on the initial proceeding.

APPEAL No. 75 of 1914 from an order (12th April 1912) of the High Court at Calcutta, which affirmed on appeal an order (22nd April 1911) of the Court of the District Judge of Murshidabad.

The petitioner in Insolvency Proceedings was the appellant to His Majesty in Council.

The appellant, on 21st May 1909, presented a petition to the District Court of Murshidabad under section 5 of the Provincial Insolvency Act (III of 1907) praying to be adjudged an insolvent. He stated that his debts amounted to about 12 lakhs of rupees;

^o *Present* : LORD SHAW, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

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that his assets were about 5 lakhs; that he had been unable to effect a composition with his creditors; and that he sought the protection of the Court so that his available assets might be rateably distributed among all his creditors.

The respondents were some of the creditors who appeared to contest the application, and filed objections in which they charged the appellant with certain acts of bad faith, and stated, as was the fact, that on 19th March 1906 he had filed a similar petition of insolvency in the High Court at Calcutta which had been dismissed on 19th June 1907, and the order dismissing it was confirmed on appeal on 26th November 1907.

The appellant denied the charges of bad faith, and contended that such matters as that and the dismissal of his former petition should be raised at a later stage and that he was of right entitled to an order of adjudication.

That contention was raised when the petition was heard in the District Court, but the District Judge adjourned the hearing for the purpose of first considering the matters alleged by the creditors. Subsequently the case came before the officiating District Judge who held that under section 15 of the Act the question of *bona fides* should be taken at that stage, and finding on the affidavits that "the application was an abuse of the process of the Court," he dismissed it with costs.

The appellant appealed to the High Court, but a Bench of that Court (SIR C. M. W. BRETT and SHARFUDDIN JJ.) dismissed the appeal summarily under Order XLI, rule 11 of the Code of Civil Procedure, 1908. An application for review of that order was also dismissed.

The High Court (SIR LAWRENCE JENKINS C. J. and

B. K. MULLICK J.) granted a certificate for leave to appeal to His Majesty in Council; the order of the Court will be found reported in I. L. R. 40 Calc. 685.

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The appeal was first heard by the Board on 14th March, but during the argument it was found that the evidence on which the finding of the Courts in India was based that the application for an order of adjudication was "an abuse of the process of the Court" was not on the Privy Council record of the appeal; and the Board made an order remitting the case to India, and adjourned the hearing until such evidence had been received.

Sir H. Erle Richards, K. C., and *Sir William Garth*, for the appellant, contended that the requirements of sections 5 and 6 of the Provincial Insolvency Act (III of 1907) having been admittedly satisfied, the appellant was, on the construction of the Act, entitled as of right to an order of adjudication under section 16. The Court had no jurisdiction to dismiss the application under section 15, or at all. Reference was made to sections 4, 5 and 6, sub-section (3), section 11, sub-section (2), and sections 14, 15, 16, 43, and 44 of the Act. The question whether the appellant had been guilty of bad faith should not have been determined on the application for adjudication, but at a later stage after the facts had been fully investigated, and when the debtor applied for an order of discharge. The appeal to the High Court was dismissed summarily under Order XLI, rule 11 of the Civil Procedure Code, 1908, and no reasons were given. The following cases were referred to show that a debtor applying for an order of adjudication has the right to obtain it, if all the requirements of the Act have been observed: *Uday Chand Maiti v. Ram Kumar Khara* (1), *Samiruddin*

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v. *Kadumoyi Dasi* (1), *Abdul Razak v. Basiruddin Ahmed* (2), *Girwardhari v. Jai Narain* (3) a case which has been adopted by a Full Bench in the case of *Tribokinath v. Badri Das* (4), and *Bava Jeer Chetti v. Bava Reingasami Chetti* (5). Cases in the English Courts under the Bankruptcy Act of 1883 were referred to as to the inherent power of the Court to deal with petitions in insolvency, and as to what amounts to an abuse of the process of the Court: *In re Betts* (6), *Ex parte Painter* (7), *In re Bond* (8), and *In re Hancock* (9). The only result of refusing the order of adjudication is that the assets will not be rateably divided for the benefit of the creditors.

De Gruyther, K. C., and *B. Dubé*, for the respondent No. 2, contended that no question of law arose as the Courts below had held that the appellant's application was an abuse of the process of the Court, and on that ground should be dismissed. There was no appeal from that decision nor was ground of appeal now put forward. Where the Courts had come to such a conclusion, this Board would not interfere with their decision. The Courts had the power under section 15 of the Act of dismissing the application if they were satisfied that the circumstances were such that it ought to be dismissed. In section 5 the word used is "may." The Court, therefore, had a discretion and was not bound to make an order of adjudication. Section 15 ought to be read in the same way whether the debtor or the creditor is concerned. The Court had an inherent right to dismiss the petition. Reference was made to *Girwardhari v. Jai Narain* (10)

(1) (1910) 15 C. W. N. 244.

(6) [1901] 2 K. B. 39, 50.

(2) (1911) 17 C. W. N. 405, 408.

(7) [1895] 1 Q. B. 85, 89.

(3) (1910) I. L. R. 32 All. 645, 647.

(8) (1888) L. R. 21 Q. B. D. 17.

(4) (1914) I. L. R. 36 All. 250.

(9) [1904] 1 K. B. 585.

(5) (1911) I. L. R. 36 Mad. 402.

(10) (1910) I. L. R. 32 All. 645, 650.

per CHAMIER J., and Maxwell on the interpretation of statutes as to the construction of the word "may."

Sir H. Erle Richards, K. C., called on only as to the non-production of the evidence as above mentioned, said that the documents were omitted by consent of both parties. They were not the appellant's documents.

[The further hearing took place on 1st November, and after hearing counsel on either side their Lordships, without calling on the appellant to reply, reserved their decision.]

The judgment of their Lordships was delivered by

SIR LAWRENCE JENKINS. Chhatrapat Singh Dugar, the present appellant, on the 21st May, 1909, presented as a debtor an insolvency petition under the Provincial Insolvency Act, 1907, to the District Court of Murshidabad for an order adjudging him an insolvent.

His application was opposed by the present respondents and was dismissed. The debtor's consequent appeal to the High Court in Bengal was dismissed by an order of the 12th April, 1912, and an application for review of the High Court's judgment was equally unsuccessful. This appeal has been preferred by the debtor to His Majesty in Council from the High Court's order of the 12th April, 1912.

The Provincial Insolvency Act presents a complete and exact delineation of a debtor's right to an order of adjudication, on his own petition. Subject to the conditions specified in the Act, if a debtor commits an act of insolvency an insolvency petition may be presented by the debtor, and the Court may on such petition make an order adjudging him an insolvent. The presentation by him of a petition is deemed an act of insolvency, and on that petition the Court may make an order of adjudication (section 5).

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Provision is made by the 6th and succeeding sections for the presentation and admission of the insolvency petition, and other matters of procedure, but no express reference to them need be made in the circumstances of this case. It will suffice to say that all that is thus prescribed has been observed by the present debtor.

By the 14th section it is enacted that on the day fixed for the hearing of the petition or on any subsequent day to which the hearing may be adjourned, the Court shall require proof that the debtor is entitled to present the petition, and shall examine him if he is present

Then it is provided by sections 15 and 16 as follows:—

“ 15 (1). Where the Court is not satisfied with the proof of the right to present the petition or of the service of notice on the debtor as required by section 12, sub-section (3), or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition.

“ 16 (1). Where a petition is not dismissed under the preceding section the Court shall make an order of adjudication ”

The dismissal of Chhatrapat's petition by the District Court does not purport to rest on any failure to comply with the express terms of the Act. What was held was that the application was an abuse of the 'process of the Court and so must be dismissed. Presumably it was on this ground, too, that the High Court dismissed the appeal; no other reason is indicated. It is to be regretted that the Courts in India allowed themselves to be influenced by this plea instead of being guided to their decision by the provisions of the Act. In clear and distinct terms the Act entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion but is a statutory right;

and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an "abuse of the process of the Court." This case illustrates the peril of this doctrine in India, for what has been treated by the Courts below as such an abuse appears to their Lordships in no way to merit this censure. It may, perhaps, give rise to a contest for priority between competing creditors, but that will be, if necessary, a matter for decision hereafter in the course of the insolvency. Be that, however, as it may, their Lordships are now concerned only with the debtor's position; and as to that they are satisfied that he has complied with all the conditions specified in the Act, and is entitled as of right to an order adjudging him an insolvent. This conclusion, apart from the decision under appeal, is in agreement with the current of authority in India, where it has been rightly held that the stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the Court, and not on the initial proceeding. As the dismissal of Chhatrapat's petition was, in their Lordships' view, erroneous, they will humbly advise His Majesty that the order of the High Court of the 12th April, 1912, be reversed with costs, and in lieu thereof an order be made discharging the order of the District Court and adjudging Chhatrapat Singh Dugar an insolvent. The respondents will pay the costs of this appeal.

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Appeal allowed.

Solicitor for the appellants : *G. C. Farr.*

Solicitors for Raja Bejoy Singh Dudhuria, respondent No. 2 : *Barrow Rogers & Nevill.*

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[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Mortgage—Agreement postponing payment of interest and selling property to mortgagee, if not then paid—Construction of contract—Mode of calculating the manner of payment of purchase-money under the contract on execution of decree for specific performance—Delay in transfer of property to mortgagee—Rules of English Courts as to rights of Vendor and Purchaser—Transfer of Property Act (IV of 1882), s. 54.

A mortgage deed of certain land was executed in favour of the appellant to secure re-payment of Rs. 50,000 with interest, which the mortgagor expressly covenanted to pay, on 30th December 1905, which was afterwards extended for three months from 3rd January 1906. On 4th April 1906 the mortgagor, being unable to pay the interest, wrote as follows to the mortgagee: "I write this to inform you that as I have not got the interest due on Rs. 50,000 ready now, I request you to give me three months more for payment to you of all interest due thereon. Should I fail to do so on or before 6th July 1906, I agree to the whole land being sold to you for Rupees one lakh (Rs. 1,00,000). After deducting out of this amount Rs. 50,000 already received by me and all interest due thereon, the balance should be paid to me when the land shall become yours unconditionally." The mortgagee agreed to these terms, and the loan was renewed on 6th April 1906, the interest was not paid on 6th July, and the mortgagor refused to execute a conveyance of the property. In a suit for specific performance of the contract of 4th April 1906, the mortgagee obtained a decree in May 1909, but he only entered into possession of the property on 24th March 1911. On an application for execution of the decree, a question arose as to the manner in which the purchase money payable under the contract ought to be calculated, and an Appellate Bench of the Chief Court decided that the mortgagee was only entitled to bring into account the amount due for principal and interest up to 6th July 1906:—

Held by the Judicial Committee (reversing that decision), that on the true construction of the contract, the appellant was entitled to deduct

Present: THE LORD CHANCELLOR (LORD BUCKMASTER), LORD ATKINSON
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interest up to the date of his getting possession. The general rules by which the rights of vendors and purchasers are regulated were not applicable here, because the rights as to the payment of interest were governed by the express provisions of the contract.

Semle : The rules of English Courts of Equity had no application to the sale of real estate in Lower Burma, section 54 of the Transfer of Property Act expressly providing that (apart from a registered instrument) such a contract created no interest in, or charge upon, the land.

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APPEAL No. 153 of 1915 from a judgment and decree (14th December 1914) of the Chief Court of Lower Burma on its appellate side which reversed a judgment and order (17th December 1912) of the same Court on its original side which had affirmed an order (3rd September 1912) of the 2nd Deputy Registrar of the same Court.

The petitioner in execution of decree was the appellant to His Majesty in Council.

The question in dispute arose in the matter of the execution of a decree for the specific performance of a contract by which one G. W. Davis (now deceased, and represented by Maung Inn the Administrator *pendente lite* of his estate) agreed to sell to the appellant certain lands and buildings which had been previously mortgaged to the latter by Davis. The issues for decision in this appeal were whether the appellant was entitled to set off against the purchase-money the interest payable under the mortgage up to the date when possession was actually obtained by him, or whether he was only entitled to set off such interest up to the date when the contract should have been performed; and whether in the latter case the representatives of Davis should be ordered to account for the rents and profits from the date on which the contract should have been performed to the date on which the possession of the lands and buildings was actually obtained by the appellant.

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The mortgage of the lands and buildings by Davis to the appellant was executed on 30th September 1905 to secure to the appellant payment of Rs. 50,000 on 30th of December 1905, together with interest at the rate of 8 annas per cent. per mensem, and also interest at the current bank rate of interest in Rangoon. The time for payment was afterwards extended to three months from the 3rd January 1906.

On 4th April 1906 Davis wrote and signed the following letter to the appellant :—

" I write this to inform you that as I have not got the interest due on Rs. 50,000 ready now, I request you to give me three months more for payment to you of all interest due thereon. Should I fail to do so on or before the 6th July 1906 I agree to the whole land being sold to you for Rupees one lakh (Rs. 1,00,000). After deducting out of this amount Rs. 50,000 already received by me and all interest due thereon, the balance should be paid to me when the land shall become yours unconditionally."

The appellant accepted those terms and renewed the loan on 6th April 1906. Davis did not pay any interest on or before the 6th July 1906, and after a demand requiring him to carry out the agreement of 4th April which was refused the appellant on 17th August 1906 brought a suit against Davis in the Chief Court of Lower Burma for specific performance of that agreement, or in the alternative for Rs. 1,00,000 damages for breach of contract. In defence Davis denied that he signed the letter of 4th April, but alleged that even if he did the contract could not be specifically enforced as it restricted his right of redemption.

The suit was heard by MOORE J. who held that the appellant had failed to prove that Davis had signed the letter of 4th April 1906, and consequently dismissed the suit with costs; but that decision was on appeal reversed by the Appellate Court (SIR C. FOX and PARLETT J.) which, on the 11th May 1909, made a decree for specific performance of the agreement

contained in that letter. That decree was affirmed, on appeal by Davis, by the Judicial Committee of the Privy Council on 14th June 1911. The appeal is reported in I. L. R. 38 Calc. 801: L. R. 38 I. A. 155. The execution proceedings which gave rise to the present appeal were commenced on 17th December 1909 by an application of the appellant to the Chief Court of Lower Burma for execution of the decree for specific performance of the 11th May 1909, which was then under appeal to the Privy Council, by the execution of a conveyance of the mortgaged property to the appellant. Davis not appearing, an *ex parte* order for execution was made, but was eventually set aside on the ground that notice of the application had not been duly served on Davis; and subsequently the rehearing of the application was postponed from time to time, and ultimately until the final decision of the appeal to the Privy Council had been given. Meantime, the appellant obtained possession of the lands and buildings (the subject of the suit) on 24th March 1911, and on 26th June he filed an affidavit stating that fact and showing that the total amount due under the mortgage for principal and interest up to the date when he so took possession, was Rs. 87,452-6-5.

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After the order of the Privy Council dismissing Davis' appeal, the application for execution was restored to the list, and the hearing fixed for 14th August 1911. Applications were then made by the 2nd and 3rd respondents (Khorshed and Burjorjee). Khorshed was a mortgagee of the property in suit for Rs. 30,000 under a mortgage executed by Davis on 11th March 1909; and Burjorjee was a mortgagee of the property for Rs. 40,000 and Rs. 10,000 respectively under two mortgages executed by Davis both dated 3rd January 1910. Both mortgagees claimed to be entitled to charges or liens on the purchase-money

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to be paid into Court by the appellant. They were both added as parties to the proceedings without prejudice to the right of the appellant to raise the question of the effect of the doctrine of *lis pendens*.

Davis died on 14th August 1911 and Maung Inn, the 1st respondent, was substituted for him on the record.

The application for execution came on for re-hearing before the 2nd Deputy Registrar of the Chief Court on 30th August 1912, when the 1st respondent did not appear, but the 2nd and 3rd respondents appeared by counsel, who raised (*inter alia*) the point that the appellant was not entitled to interest under his mortgage after the 6th July 1906, the date on which the contract for sale should have been performed, and that was the only question now material to this appeal.

On the 3rd September, the Deputy Registrar found that the appellant's mortgage did not become extinguished on 6th July 1906, and that it being a continuing mortgage and having priority over the mortgages executed in favour of the 2nd and 3rd respondents, the appellant was entitled to interest under it up to 24th March 1911, when he obtained possession of the lands and buildings. The Deputy Registrar also found that the amount due to the appellant for principal and interest on his mortgage up to 23rd March 1911 was Rs. 85,784-5-1, and ordered a conveyance to him to be executed.

On 1st October 1912, the 2nd respondent petitioned that the order made by the Deputy Registrar should be referred to a Judge of the Chief Court; and it accordingly came before ORMOND J., who held that on the true construction of the agreement of 4th April 1906, the amount due under the mortgage at the date of the completion was to be deducted from the

purchase-money, and that the rights of the appellant under the mortgage were to continue until Davis had complied with the agreement. ORMOND J. consequently upheld the decision of the Deputy Registrar, and dismissed the second respondent's application.

From that decision the 2nd respondent appealed making respondents the appellant and the 1st respondent, and submitting that on a proper construction of the agreement of 4th April 1906 the estate of Davis was not liable to the appellant as mortgagee after three months from that date; that the second respondent was a mortgagee prior to the agreement of 4th April 1906, as his mortgage of 11th March 1909 had been made in pursuance of an agreement of 31st January 1906 for securing the repayment with interest of Rs. 30,000 lent to Davis; that the rights of the 2nd respondent as mortgagee could not be affected by any act of Davis; that the appellant was entitled to mesne profits as against Davis; and that in any case after 11th May 1909 interest ceased to run in favour of the appellant.

On 14th December 1914, the Chief Court on its appellate side (SIR CHARLES FOX, Chief Judge, and PARLETT J.) held that the agreement of 4th April 1906 contemplated that the land should belong to the appellant if Davis did not pay the interest due on the mortgage before 7th July 1906, and if the appellant paid Davis the difference between the amount due on the mortgage up to that date and a lakh of rupees; and that both parties must have contemplated that the liability of Davis to pay interest on the mortgage after that date should cease and that therefore the appellant became in equity the owner of the property from 7th July 1906, on which date the liability of Davis to pay interest on the mortgage ceased, the appellant becoming entitled to the rents and profits, and Davis

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becoming entitled to receive from the appellant interest on the amount of money the latter should have paid on that date. The Appellate Court further held that the fact that the appellant omitted to claim the rents and profits in his suit for specific performance did not enable him to obtain subsequent interest after the date on which he in equity became owner of the property. The Appellate Court therefore allowed the appeal, and ordered that an account should be taken of what was due for principal and interest on the mortgage up to the 7th July 1906, and that the appellant should pay into Court the difference between that amount and one lakh of rupees.

On this appeal,

Sir H. Erle Richards, K. C., and F. J. Coltman, for the appellant, contended that on the true construction of the contract of 4th April 1906 interest was not to cease on 6th July 1906, but was to be paid under the mortgage up to the date of the actual completion of the sale, or up to the date on which the appellant received possession of the lands, and that was the amount of interest to be deducted from the purchase-money. The Chief Court was wrong in holding that the mortgage must be taken as becoming merged in the appellant's ownership of the land on 6th July 1906. The rule that by the English doctrine of equity the property vested in the purchaser on the date fixed for completion of the contract, was not applicable here because the purchaser was kept out of possession by the vendor; and because by section 54 of the Transfer of Property Act (IV of 1882), a contract for the sale of land does not, apart from a registered instrument, create any interest in the land. That section applied to Lower Burma, and excluded the rule of English equity. Reference was made to the Burma Gazette,

Part I, page 684; Dart's Vendors and Purchasers (7th ed.), Vol. I, pages 652, 653; and Stokes' Anglo-Indian Codes, Vol. I, page 730.

Cunliffe, K. C., and *D. Cotes Preedy* (for *Kenelm Preedy* serving with His Majesty's Forces), for the second and third respondents, contended that interest was not payable under the mortgage after 6th July, 1906; the letter of 4th April 1906 was a clear agreement between Davis and the appellant that the latter was, if the interest due was not paid, to take over the mortgaged property as from 6th July. The relation between the parties then changed to that of vendor and purchaser; and the mortgage became merged in, or extinguished by, the appellant's title as purchaser, and as held by this Board in *Davis v. Maung Shwe Goh* (1), the relation of mortgagor and mortgagee with the right of the former to redeem, came to an end: *Noakes v. Rice* (2) per Lord Macnaghten [*Lord Atkinson* referred to *Birch v. Joy* (3), as to rights in equity between vendor and purchaser before completion]. The appellant should get only the rents and profits of the property from 6th July, 1906, less the interest due on the balance of the purchase money payable to the vendor.

Sir H. Erle Richards, K. C., replied.

The judgment of their Lordships was delivered by THE LORD CHANCELLOR. This appeal is a step—and their Lordships hope the last step—in litigation, which was commenced on the 17th August, 1906, by the present appellant, who claimed against one George William Davis specific performance of a contract dated the 4th April, 1906, for the sale of some 19,318 acres of land situate in the Pegu district, Lower

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(1) (1911) I. L. R. 38 Calc. 805; (2) [1902] A. C. 24, 30.

L. R. 38 I. A. 155.

(3) (1852) 3 H. L. C. 565, 590.

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Burma. The question raised depends on the true construction of this contract, but in order to understand its meaning it is necessary to consider some antecedent facts.

On the 30th September, 1905, a formal mortgage of the property, which subsequently became the subject of the contract, was executed by the defendant Davis in favour of the appellant to secure the repayment of 50,000 rupees on the 30th December, 1905, together with interest at the rate of 8 annas per cent. per month, and also interest thereafter at the current bank rate of interest in Rangoon. It appears from the mortgage that it was really given as security for the payment of 50,000 rupees, the amount of 5 hundis which had been drawn by the mortgagor upon the mortgagee and negotiated by the mortgagor with the Bank of Bengal. The mortgage contained a formal conveyance of real property and a covenant, the effect of which has already been mentioned. It also contained a further and independent covenant that if the sum of 50,000 rupees should not be paid when it was due, the mortgagor would pay interest thereon at 8 annas per cent. per month, and also interest on the 50,000 rupees at the current bank rate until the principal should be duly paid. The hundis were not met by the mortgagor at the due date, and were renewed until the 4th April 1906, on which date the mortgagor, not being in a position to pay the money, wrote to the plaintiff a letter in the following terms:—

“My dear Maung Shwe Goh,

“I write this to inform you that as I have not got the interest due on 50,000 rupees ready now, I request you to give me three months more for payment to you of all interest due thereon. Should I fail to do so on or before the 6th July, 1906, I agree to the whole land being sold to you for 1 lakh rupees (100,000 rupees). After deducting out of this amount 50,000 rupees already received by me and all interest due thereon, the balance should be paid to me when the land shall become yours unconditionally.”

The request was acceded to by the plaintiff, and the contract thus made is the contract in question.

The money was not paid by the date fixed, and on the 6th July 1906, the mortgagee paid to the Bank of Bengal the 50,000 rupees due on the hundis, and thus became entitled to whatever rights were conferred upon him by the agreement. The mortgagor refused to execute a conveyance of the property to the plaintiff, indeed he denied the authenticity of his signature to the contract, and thus compelled the plaintiff to institute the proceedings out of which this appeal has arisen.

The learned Judge by whom the suit was heard dismissed it on the 18th February, 1908, but this judgment was reversed by the Chief Court of Lower Burma, and by their order of the 11th May, 1909, specific performance of the agreement contained in the letter of the 4th April, 1906, was ordered against the mortgagor, and this order was affirmed on appeal by this Board on the 5th July, 1911.

The defendant Davis died on the 14th August, 1911, and the first respondent to this appeal is his legal representative. The other respondents represent mortgagees from Davis under mortgages executed subsequently to that in favour of the plaintiff.

The appellant entered into possession of the property on the 24th March, 1911, but it does not appear that even up to the present time a proper conveyance of the equity of redemption has ever been executed in his favour, an order obtained from the Court on the 25th January, 1910, directing such conveyance to be executed on behalf of Davis by the Assistant Registrar, having been set aside upon the grounds that proper notice of the application had not been served upon Davis.

The present appeal arises out of an application

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which is in form for execution of the judgment for specific performance, and the question involved affects only the manner in which the purchase-money payable under the contract for sale ought to be calculated. On the part of the appellant, it is contended that interest continued to run upon his mortgage until the date when he entered into possession, that consequently the principal sum of 50,000 rupees, together with the agreed interest up to that date, ought to be deducted from the 100,000 rupees, which was the purchase price, and the balance only should be paid by him. This view was accepted by the Registrar and his decision was upheld by the Judge of the Chief Court, but was reversed by the Appellate Court, who decided that the appellant was only entitled to bring into account the amount due for principal and interest up to the 6th July, 1906. The foundation of this judgment depends upon the application to the contract of the 4th April, 1906, of the well-known rule by which the rights of vendors and purchasers of real estate are regulated in this country. In the English Courts, a contract for sale of real property makes the purchaser the owner in equity of the estate, and from this principle it follows that, where the rights as to payment of interest on the purchase-money are not regulated by the terms of the contract, the purchaser is deemed to be entitled to the rents and profits of the property, as from the time when he did take, or could safely have taken, possession; and interest on the purchase-money runs in favour of the vendor from that time. It has been pointed out to their Lordships that the underlying principle, upon which this rule depends, has no application to the sale of real estate in Lower Burma, since by section 54 of the Transfer of Property Act, 1882 (a statute made applicable to Lower Burma), it is expressly provided that such a

contract creates no interest in or charge upon the land. If, therefore, the contract was silent in dealing with the question of interest, their Lordships think that the appellant would have strong ground for contending that the reasoning in the Court of Appeal could not be supported. It is an unfortunate fact that this argument never appears to have been raised at any earlier stage of these proceedings; and their Lordships have not, therefore, the advantage of the opinion of the learned Judges of the Appellate Division upon this point. But the matter need not be pursued because, in their Lordships' opinion, apart altogether from this consideration, upon the true construction of the contract the appellant must succeed. At the date when the contract was executed a valid legal mortgage was on foot, containing an express covenant for payment of the 50,000 rupees and interest until the debt was discharged. The money was due when the contract was made, and the contract opens with the request for three months' further time for payment of the "interest due thereon." In this connection, it is clear that the "interest due thereon" is the interest payable under the mortgage deed up to the time, whatever it may be, on or before the 6th July, 1906, when the 50,000 rupees might be paid. On failing to pay at the date, the agreement became operative for sale of the land, and the final words, in their Lordships' view, which provided for deduction from the purchase price of the 50,000 rupees "and all interest due thereon," means that this deduction should be made at the time when the balance is to be paid, and this would be the completion of the contract. The mere fact that the phrase "interest due thereon" occurs twice in the contract does not involve the conclusion that the date up to which interest is to be calculated is the same on both occasions, but when

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once it is accepted that the dates are different all difficulty disappears, since it then follows that interest is by agreement continuing to run on the principal money. This interest is that reserved under the mortgage deed, and it must continue to run until the debt is discharged, which can only be when the balance is struck and paid. If, therefore, possession had not been taken by the purchaser, and no default could be attributed to him, the interest would have gone on until the transfer was executed, but it appears that he has been put into possession under the contract, and of course he could not both retain the rents and receive the interest. The order therefore of the Registrar was quite right in allowing interest up to, but not beyond, the date when he took possession.

Counsel for the respondents has urged that, by virtue of the contract, the mortgage was ended, since a mortgagee, who has contracted to buy the equity of redemption, stands in the position of a purchaser, which is inconsistent with that of a mortgagee. But, whatever might result from such argument, where the rights of the parties were entirely untouched by the terms of the contract, such consideration cannot apply where the contract has itself provided what the rights are to be. This, in their Lordships' opinion, is what the contract did, and they therefore think that the appeal succeeds.

The order appealed from must therefore be reversed with costs here and below, and the order of the Judge of first instance restored. The respondents will repay any costs paid to them by the appellant. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the appellant: *Arnould & Son.*

Solicitors for the 2nd and 3rd respondents: *Stoneham & Sons.*

J.V.W.

APPELLATE CIVIL.

Before Mookerjee and Cuming JJ.

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Bengal Tenancy Act (VIII of 1885), s. 5, cl. (5)—Its effect—Presumption applicable to a tenancy existing before the commencement of the Bengal Tenancy Act.

Clause (5) of s. 5 does not create any new rights or purport to affect any right created before the commencement of the Bengal Tenancy Act. It simply furnishes a mode of proof of the character of tenancies of certain descriptions. If the area held by a tenant exceeds 100 standard bighas and a question arises as to the status of such a tenant, the Legislature lays down that the tenancy is to be presumed to be that of a tenureholder, but the presumption thus raised is rebuttable. The clause is, consequently, a provision not of substantive but of adjective law. It lays down a presumption and changes the burden of proof. Whereas in the absence of the presumption the party who affirmed that the tenancy was of a particular description would have to give evidence in support of his contention; the presumption, where it applies, relieves the party relying thereon from the obligation to furnish such proof in the first instance.

There is no valid reason why the presumption should not be applied to a tenancy which existed before the commencement of the Bengal Tenancy Act.

The presumption embodied in section 5, clause (5) does not incorporate a novel principle into our law but merely codifies what had been a recognized doctrine under the old law. The only difference caused by the adoption of the presumption is that we have now a definite rule of evidence, a crystallized mode of proof.

* Appeals from Appellate Decrees, Nos. 2963 and 3450 of 1913, against the decrees of S. C. Mallick, District Judge of Nadia, dated July 30, 1913, affirming the decree of Nagendra Nath Dhar, Subordinate Judge of Nadia, dated Dec. 23, 1912.

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Dhanput Singh v. Gooman Singh (1) *Gopee Mohun v. Sibchander* (2), *Sarat Chandra v. Ratubuddin* (3), *Coggett v. Railway Co.* (4) followed.

The fact that a tenancy had been subdivided into two tenancies before the Bengal Tenancy Act would not prevent the application of sub-section (5) of section 5 in determining the character of the tenancy. The tenure was divisible, and the fact of subdivision was not a breach of its continuity. Each fragment carved out of the original tenure retained its incident.

Adit v. Sukhrāj (5), *Chandra Kanta v. Ram Krishna* (6) followed.

Proof of the purpose of the original grant determines the real nature of the tenancy.

Durga v. Kalidas (7), *Promotho Nath Kumar v. Nilmani Kumar* (8), *Promoda Nath Roy v. Asir-uddin Mandal* (9) followed.

Mahabir v. Fox (10), *Bazlul Karim v. Satish Chandra* (11), *Nityananda v. Nanda Kumar* (12), *In re School Board Election for Parish of Pulborough* (13), *In re Athlumney* (14), *Main v. Stark* (15), *Reynolds v. Attorney-General* (16). *Bengal Indigo Company v. Roghobur Das* (17) referred to.

Maharam Chaprasi v. Telam-ud din Khan (18) distinguished.

SECOND Appeal by Jagabandhu Shaha.

This appeal arose out of a suit for a declaration that the three *jamas* which were within the *Darputni* of the plaintiff and which comprised an area of 113 bighas of land altogether were occupancy holdings and that the defendant Magnamoyi Dassee having purchase them by a *Kabala* from plaintiff's registered tenant Kali Prasanna Pal without the consent of the landlord plaintiff had not acquired any title thereto and for recovery of *khas* possession of the lands on ejecting the defendant therefrom. The defence *inter*

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| (1) (1864) W. R. Gap., Act X, 61. | (10) (1909) 9 C. L. J. 467. |
| (2) (1864) 1 W. R. 68. | (11) (1911) 13 C. L. J. 418. |
| (3) (1909) 16 C. L. J. 271. | (12) (1910) 13 C. L. J. 415. |
| (4) (1903) 132 N. C. 852. | (13) [1894] 1 Q. B. 725, 737. |
| (5) (1912) 17 C. L. J. 435. | (14) [1898] 2 Q. B. 547, 551. |
| (6) (1916) 20 C. W. N. 1002. | (15) (1890) 15 App. Cas. 384, 388 |
| (7) (1881) 9 C. L. R. 449. | (16) [1896] A. C. 240 ; 244. |
| (8) (1911) 14 C. L. J. 38. | (17) (1896) I. L. R. 24 Calc. 272. |
| (9) (1911) 15 C. W. N. 896. | (18) (1911) 15 C. L. J. 220. |

alia was that the suit was not maintainable on account of certain amendments made in the plaint, that the three *jamās* were not non-transferable occupancy holdings, that they had been created before the Permanent Settlement for the purpose of settling *ryots* thereon and had all along been held at fixed rents or rate of rent and that inasmuch as they were transferable, the defendants had acquired a valid title to the same and were not liable to be ejected therefrom. The Subordinate Judge held that there had been no defect in the suit on account of amendment made in the plaint or any other preliminary ground, that out of the three the two *jamās* of 25 bighas each were non-transferable occupancy holdings, but the third one of 63 bighas was not an occupancy holding but a tenure and that the defendant by her purchase had acquired no valid title to the first two *jamās* but acquired a good title to the third *jama* of 63 bighas and on these findings the Subordinate Judge decreed the plaintiff's claim as regards the two *jamās* of 25 bighas each, but dismissed it as regards the third *jama* of 63 bighas. Both parties appealed to the District Judge who upheld the judgment and decree of the lower Court.

Hence these appeals to the High Court in which the decree of the District Judge has been assailed by each of the parties in so far as that decision is adverse to his interest.

Sir S. P. Sinha, Dr. Dwarka Nath Mitra and Babu Debendra Nath Mandal, for the appellant in S. A. 2963 of 1913.

Babu Mahendra Nath Roy and Babu D. N. Bagchi, for the respondent in S. A. 2963, and appellant in 3450 of 1913.

Babu Biraj Mohan Mazumdar (for *Dr. Dwarka Nath Mitra*), for the respondent in 3450 of 1913.

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MOOKERJEE AND CUMING JJ. The subject-matter of the litigation, which has culminated in these appeals, comprises the lands of three tenancies held by one Kaliprasanna Pal under the plaintiff. The plaintiff asserts that the tenancies were non-transferable, and, yet on the 22nd June, 1909, the tenant transferred the lands to the defendant who entered into wrongful possession. He consequently instituted this suit on the 20th September, 1911, for recovery of possession on declaration of title. His claim was resisted substantially on the ground that the tenancies were transferable. As regards the first two tenancies, each of which consisted of 25 bighas of land, the defendant alleged that they were ryoti holdings held at a fixed rent and were consequently transferable in the same way as a permanent tenure under section 18 of the Bengal Tenancy Act. As regards the third tenancy, which comprises an area of 63 bighas, she pleaded that it constituted a transferable tenure. The Court of first instance came to the conclusion that the first two tenancies constituted non-transferable occupancy holdings and that the third was a transferable tenure. In this view the Subordinate Judge made a decree in favour of the plaintiff for the lands comprised in the first two tenancies and dismissed his claim in respect of the lands included in the third tenure. Appeals were thereupon preferred against the decision of the Subordinate Judge as well by the plaintiff as by the defendant. The District Judge has dismissed both the appeals and affirmed the decision of the trial Court. In this Court, the decree of the District Judge has been assailed by each of the parties in so far as that decision is adverse to his interests.

The question for determination in the appeal preferred by the plaintiff is, whether the lands comprised in the third tenancy constitute a transferable tenure.

It has been found by both the Courts below that the 63 bighas now in suit formed part of a tenure of 126 bighas, which was divided into two tenancies of 63 bighas each at some date anterior to the commencement of the Bengal Tenancy Act. They have held in substance that the statutory presumption embodied in clause (5) of section 5 of the Bengal Tenancy Act is applicable to the circumstances of this case, that, till the contrary is proved, the tenancy of 126 bighas must be presumed to have been a tenure, and that, consequently, the lands now in suit, which comprise one-half of the lands included in that tenure also constitute a tenure. This view is assailed by the appellant, who assigns three reasons in support of the contention that clause (5) of section 5 has no application to the present litigation, namely, *first*, that the clause, like section 50, is limited in its application to suits or proceedings between landlords and tenants under the Bengal Tenancy Act; *secondly*, that the clause is applicable only to lands which constitute a tenancy of more than 100 standard bighas at the date of the institution of the suit wherein the character of that tenancy requires determination; and, *thirdly*, that the clause is, in any view, limited in its application to tenancies which existed as tenancies of more than 100 standard bighas at the date of the commencement of the Bengal Tenancy Act.

The first branch of this contention is sought to be supported by reference to section 50. In our opinion, the terms of clause 5 of section 5, when contrasted with the language used by the Legislature in section 50, show conclusively that there is no foundation for the argument. Sub-section 2 of section 50 states explicitly that the presumption mentioned therein applies only to suits or proceedings under the Act: *Mahabir v. Fox* (1) *Bazul v. Satish* (2), *Nityananda v.*

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(1) (1909) 9 C. L. J. 467.

(2) (1911) 13 C. L. J. 418.

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Nanda Kumar (1). If the Legislature had desired that clause 5 of section 5 should have a similarly restricted application, appropriate words might have been used to indicate that intention; and it would be clearly wrong to read into the section words not to be found there. There is thus no substance in the first branch of the contention of the appellant.

The second branch of the contention is equally groundless. The argument is that clause 5 is limited to cases of tenancies of more than 100 bighas in existence as such at the date of the institution of the suit wherein the question of the nature of such a tenancy arises for determination. The answer obviously is that the language used by the Legislature in clause 5 is perfectly general and does not support this narrow construction. As is clear from the decisions in *Bengal Indigo Co., v. Roghobur Das* (2) and *Khatajan v. Aswini* (3), the presumption applies to cases of tenancies created before the Act came into force.

The third branch of the contention of the appellant has been sought to be supported by an appeal to the principle that a statute is deemed to be, *prima facie* not retrospective in its operation. The rule on this subject is well settled and is accurately stated by Lopes, L. J. in the case of *In re School Board Election for Parish of Pulborough* (4). "Every statute which takes away or impairs vested rights acquired under existing laws or creates a new obligation or imposes a new liability or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect." As Wright J. observed in *In re Athlumney* (5), "a retrospective operation is not to be given to a statute

(1) (1910) 13 C. L. J. 415.

(3) (1909) 2 Ind. C. 72.

(2) (1896) I. L. R. 24 Calc. 272.

(4) [1894] 1 Q. B. 725, 737.

(5) [1898] 2 Q. B. 547, 551.

so as to impair an existing right or obligation, *otherwise than as regards matters of procedure*"; for, in the words of Lord Selborne, in *Main v. Stark* (1), quoted by Lord Morris in *Reynolds v. A.-G.* (2), "words not requiring a retrospective operation, *so as to affect an existing status prejudicially*, ought not to be so construed." What, then, is the true position, when we test the scope of clause 5 of section 5 in the light of these principles? We cannot, by any stretch of language, hold that it creates any new rights or purports to affect any rights created before the commencement of the Bengal Tenancy Act. It simply furnishes a mode of proof of the character of tenancies of certain descriptions. If the area held by a tenant exceeds 100 standard bighas and a question arises as to the status of such a tenant, the Legislature lays down that the tenancy is to be presumed to be that of a tenure-holder; but, be it noted that the presumption thus raised is rebuttable. The clause is, consequently, a provision, not of substantive but of adjective law; it lays down a presumption and changes the burden of evidence. Whereas in the absence of the presumption, the party who affirmed that the tenancy was of a particular description would have to give evidence in support of his contention, the presumption, where it applies, relieves the party relying thereon from the obligation to furnish such proof in the first instance. If, in respect of a tenancy, the area whereof exceeds 100 bighas, it is contended that the tenant is a raiyat and not a tenure-holder, the burden of proof lies upon the party who makes the assertion, that is, has to rebut the presumption. In substance here, as in other cases, the effect of the presumption is to shift the burden of evidence or the burden of proof as it is sometimes inaccurately called. The

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establishment of the presumption of law by proof of facts from which it arises, sustains the burden of evidence, and, so far as it extends, shifts it to the opposing side. This is implied by the fact that it creates a *prima facie* case; for the burden of evidence rests always on him who has to create or meet such a case, according as he has or has not the burden of proof properly so called; consequently, the theoretical effect of a presumption is that it is a legal ruling which affects the duty of producing evidence. This may have important practical consequences; but that does not alter the quality of a presumption and make it a rule of substantive law rather than a rule of mode of proof. We can see no valid reason why the presumption should not be applied to a tenancy which existed before the commencement of the Bengal Tenancy Act; one might as well contend that the provisions of the Indian Evidence Act are inapplicable to events and circumstances which took place before the commencement of that Act. Reliance, however, has been placed upon a passage from the judgment of the Judicial Committee in the case of *Bengal Indigo Company v. Roghobur* (1), where Lord Watson observed that "it was not necessary to notice the reasoning which prevailed in either of the courts below, because it entirely ignored the statutory *definition* of the word "raiyat" contained in section 5, sub-section 5 which was in the following terms: "where the area held by a tenant exceeds 100 standard bighas, the tenant shall be presumed to be a tenure-holder until the contrary is shown." Possibly Lord Watson intended to refer to the definition of the term "raiyat" as given in section 5, sub-section 2, for sub-section 5 does not at all define the term "raiyat"; it lays down, as we have explained, a statutory presumption in respect of

(1) (1896) I. L. F. 24 Calc. 272; L. R. 23 I. A. 158.

a tenancy which exceeds 100 standard bighas in area, a presumption which is expressly made operative, only till the contrary is established. We may further point out that the presumption embodied in section 5, clause (5) does not incorporate a novel principle into our law, but merely codifies what had been a recognised doctrine under the old law. The cases of *Dhanput v. Gooman* (1), *Gopze Mohun v. Sibchunder* (2) and *Sarat Chandra v. Ratubuddin* (3) show that the area of the land held by the tenant was taken into consideration along with other circumstances in the determination of the question of status. The only difference caused by the adoption of the presumption is that we have now a definite rule of evidence, a crystallised mode of proof, for as Walker J. puts it in *Cogdell v. Railway Co.* (4), "an inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded." We do not think it would be right to put a narrow construction upon the presumption, so as to defeat the object which the Legislature had in view; namely, to import certainty into the law and thereby to shorten, if not, to prevent litigation. We are consequently of opinion that sub-section 5 of section 5 may be properly applied to determine the character of the tenancy of 126 bighas, although that tenancy had been subdivided into two tenancies before the Bengal Tenancy Act came into operation. The tenure was divisible; the fact of subdivision clearly did not create a breach of its continuity; and each fragment, carved out of the original tenure, retained its incidents: *Adit v. Sukhray* (5), *Chandra Kanta v. Ram Krishna* (6). The tenancy of 63

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- (1) (1864) W. R. (Gap.) Act X, 61. (4) (1903) 132 N. C. 852.
(2) (1864) 1 W. R. 68. (5) (1912) 17 C. L. J. 435.
(3) (1909) 16 C. L. J. 271. (6) (1916) 20 C. W. N. 1002.

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bighas now in suit has thus been rightly held to be a transferable tenure. Though it was open to the plaintiff landlord to establish the contrary, he has failed in the attempt. The only circumstance whereon reliance has been placed on his behalf is that some tenants of the land themselves carried on cultivation and did not collect rent from under-tenants. That fact, however, is not by any means decisive as to the true character of the tenancy: *Bibhudendra v. Debendra* (1). The real nature of the tenancy would be determined by proof of the purpose of the original grant [*Durga v. Kalidas* (2), *Promotho v. Nilmani* (3), *Promoda v. Asiruddin* (4), *Bamapada Roy v. Midnapore Zemindary Co.* (5)]; but it has not been shown that the tenancy, though in respect of 126 bighas, was created for the purpose of cultivation by the grantees. The presumption thus stands un rebutted, and we must hold that there is no substance in the contention of the appellant. The appeal is consequently dismissed with costs.

We have next to deal with the appeal of the defendant, which involves the determination of the question of true character of the first two tenancies. These tenancies are admittedly agricultural holdings; the only point of difference is that while the plaintiff landlord alleges that the tenancies were non-transferable occupancy holdings, the defendant purchaser asserts that they constituted holdings at fixed rates of rent. The burden clearly lies upon the defendant to establish the truth of her allegation. It is plain that the tenancies were not transferable by local usage or custom. It is equally plain that sub-section 2 of section 50 has no application, because this is a suit, not under the Bengal

(1) (1913) 20 C. L. J. 140.

(4) (1911) 15 C. W. N. 896.

(2) (1881) 9 C. L. R. 449.

(5) (1912) 16 C. L. J. 322.

(3) (1911) 14 C. L. J. 38 ; 15 C. W. N. 902.

Tenancy Act, but under the general law, for ejection of an alleged trespasser. The defendant is consequently driven to rely upon the conduct of the parties, in the absence of direct evidence as to the terms of the original contract between them. No document is produced nor is oral evidence forthcoming to show that at the time when the grants were made, the rent was fixed in perpetuity. But the defendant has proved that the rate of rent has not been changed during the last 40 years; she also asserts that the origin of the tenancies is unknown, although the Courts below have concurrently held that the tenancies were created 40 years prior to the institution of the suit; this, however, it is said, is not based on any evidence on the record. We shall assume in favour of the defendant that the time of the origin of the tenancies is unknown, and that there is no direct evidence of the terms of the initial contract between the parties. The question, consequently, arises, whether from these circumstances, it follows as a matter of law that the contract of tenancy in its inception must have been a tenancy at a fixed rate of rent. In support of the affirmative of this proposition, reference has been made on behalf of the defendant appellant to the decision of this Court in *Maharam Chaprasi v. Telam-ud-din Khan* (1). That was a case of a non-agricultural tenancy, let out for residential purposes. It was established that the origin of the tenancy was unknown, that the land had been held at a small and uniform rate of rent for at least 60 years, and that the holding had been treated as transferable and heritable. The Court below declined to infer from these circumstances that the tenancy was permanent, because there was no permanent substantial structure erected by the tenant on the land. This Court reversed that decision, and held that the question

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(1) (1911) 15 C. L. J. 220.

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was one of mixed law and fact, and concluded, on the authority of a long line of decisions of the Judicial Committee, that from the facts proved, the only inference deducible was that the tenancy, in its inception, was permanent. The case before us is of a very different character. Here, we have two plots of agricultural land held by tenants who have been unquestionably occupancy raiyats; their rent has not been altered for a term of 40 years; and the origin of the tenancies is unknown. Can we hold, as a matter of law, that the only inference legitimately deducible from these facts is that at the inception of the tenancies, the rent was, by agreement of parties, fixed in perpetuity? It is plain that the inference as to the terms of the original contract is drawn from the conduct of the parties. The only conduct of the plaintiff or his predecessor whereupon reliance is placed by the defendant, is his omission to claim enhancement of rent for a period of 40 years. Does such forbearance on the part of the landlord necessarily justify the inference that the contract of tenancy in its inception was for payment of rent fixed in perpetuity? The answer must obviously be in the negative. The conduct of the landlord, though consistent with the hypothesis that the rent was fixed in perpetuity, is equally consistent with a very different hypothesis. The landlord might not have sued for enhancement of rent, because, in view of the amount of rent already fixed, as well as the character of the land comprised in the tenancies, no further rent could be legitimately claimed. We have no information about the history of the holding or the condition of the land included therein. We do not know what would be fair rent at the present time or would have been fair rent during years past. In these circumstances, from the mere forbearance on the part of the landlord to claim enhancement of

rent even for 40 years, the inference does not follow as a matter of course that the original contract was for payment of rent by the tenant at a fixed rate forever. If we were to accede to the contention of the defendant appellant, we would be driven to hold in substance that every landlord who refrains from the institution of a suit for enhancement of rent of an occupancy holding, does so, at his peril, and that his forbearance, however just, will raise a presumption against him that the tenant held at a rent fixed in perpetuity. From whatever standpoint we examine the case, it thus transpires that this appeal also is groundless and must be dismissed with costs.

S. K. B.

Appeals dismissed.

APPELLATE CIVIL.

Before Fletcher and Teunon JJ.

HEM CHANDRA BISWAS

v.

PURNA CHANDRA MUKHERJI.*

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June 26.

Limitation—Payments towards debt—Court, if it can find out whether it is for principal or interest—Limitation Act (IX of 1908), s. 20.

Where payments are made towards a debt, but there is nothing to show whether they had been made in respect of principal or interest, the Court is entitled to find out on the evidence for what purpose the payments were made.

SECOND APPEAL by Hem Chandra Biswas, the defendant No. 1.

* Appeal from Appellate Decree, No. 1018 of 1915, against the decree of G. N. Roy, District Judge of Burdwan, dated Jan. 30, 1915, reversing the decree of Banamali Sen, Munsif of Burdwan, dated Feb. 10, 1914.

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This appeal arose out of a suit on a mortgage bond dated the 3rd July, 1895. The bond was in favour of Shibamohinee, the *pro forma* defendant in the suit. The plaintiff's case was that he was the real creditor and the bond was in the *benami* of Shibamohinee. The defendant pleaded that he borrowed the money from Shibamohinee herself and that he had paid off the debt. The principal sum lent was Rs. 111. The total amount claimed including interest was Rs. 490, after deducting the three payments of Rs. 10, Rs. 80 and Rs. 10 made on the 28th August, 1900, 24th October, 1900, and 3rd February, 1903, respectively, that had been entered on the back of the bond. The defendant further contended that the bond was barred by limitation, as it did not appear on the face of it whether the last payment of Rs. 10, made on the 3rd February, 1903, was towards principal or interest, and that therefore the plaintiff could not get the benefit of section 20 of the Limitation Act. The suit was instituted on the 20th June, 1913.

The Munsif held that the plaintiff was the real creditor, but dismissed the suit on the ground of limitation, as his conclusion was that the last payment in 1903 was neither for principal, nor for interest *as such*, but was on general account.

On appeal by the plaintiff, the District Judge held on the evidence on record that the last payment in 1903 had been made towards principal and that the bar of limitation was thus removed. The suit was decreed.

The defendant then preferred this appeal to the High Court.

Babu Manmātha Nath Ray, for the appellant. The only question is whether the alleged payment of the 20th Magh, 1309, corresponding to the 3rd February,

1903, saves limitation under Article 20 of the Limitation Act. I submit it does not. The plaintiff says that he credited the amount towards interest, and the present suit has been instituted on that basis as is apparent from the account given in the plaint. The Court of Appeal below finds that there was no express declaration on the part of the debtor that the payment was for interest, and there is no other circumstance showing that the payment was expressly for interest. Under these circumstances, the creditor cannot claim the benefit of s. 20 of the Limitation Act: it must be shown that the payment was made on account of interest *as such*: *Muhammad Abdulla Khan v. Bank Instalment Company* (1), *Bitari Ram v. Kanji Singh* (2). The mere appropriation by the creditors of the payment as interest is not such an indication. The finding of the Court of Appeal below that the payment is to be regarded as part-payment of principal is wrong, because (i) it is contrary to the plaintiff's own case, *vide* plaintiff's case in the plaint and his deposition; (ii) it is based on no evidence; it is rather in contravention of the plaintiff's own evidence; and (iii) there was neither a declaration nor an appropriation—the fact that the payment was a part-payment of principal must appear in writing: *Mackenzie v. Tiruvengadathan* (3), *Hanmantmal Motichand v. Ramba Bai* (4). The word "payment" in the last paragraph of sub-section (1) of section 20 means "part-payment of principal." Principal must be paid as principal: *Ranchordas Tribhowandas v. Pestonji Jehungir* (5).

Babu Suratkumar Mitra, for the respondent. Defendant did not say anything whether they were paid for principal or for interest. That appears from the

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(1) (1909) I. L. R. 31 All. 495.

(3) (1886) I. L. R. 9 Mad. 271.

(2) (1913) 19 C. W. N. 237.

(4) (1879) I. L. R. 3 Bom. 198.

(5) (1907) 9 Bom. L. R. 1329.

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plaintiff's deposition. The Court is entitled to go into evidence to find out the nature of payment. The cases cited by my learned friend have no application to cases of the present description. The only case of which I am aware that is to the point, is *Subraya Kamati v. Pakaya* (1). It is a question of fact. The case of *Damodar Ramchander Bapat v. Bai Jankibai* (2) explains *Subraya's Case* (1), and as it appears to me is really inconsistent with it. But all the same the later case also holds that it is a question of fact. If it is so, the appellant can hardly say anything. The finding of fact is in my favour.

Babu Manmatha Nath Ray, in reply.

FLETCHER J. This is an appeal by the first defendant from the judgment of the learned District Judge of Burdwan dated the 30th January, 1915. The suit was brought to enforce a mortgage security and the only question that has been raised in this appeal is one of limitation. The mortgage was dated the 3rd July, 1895, and the present suit was instituted on the 20th June, 1913. Both the lower Courts have found that three payments were made, namely, Rs. 10 on the 18th August, 1900, Rs. 80 on the 25th October, 1900 and Rs. 10 on the 3rd February, 1903. It is common ground that the plaintiff must succeed, if at all, on proving the payment of the 3rd February, 1903 which would save the suit from being barred by limitation. The view that has been taken by the learned District Judge is this:—First of all, he says “Was this payment of the 3rd February, 1903, a payment on account of interest as such within the meaning of section 20 of the Indian Limitation Act?” The learned Judge apparently came to the conclusion that the payment

(1) (1902) 4 Bom. L. R. 231.

(2) (1903) 5 Bom. L. R. 350.

not having been expressly made as such, the evidence did not establish that it was made on account of interest as such. He then said that the case did not end there because admittedly there was a payment and there was also a document (from which the fact of the payment appeared) in the handwriting of the person making the same. The learned Judge said "If I am wrong in the conclusion that I have arrived at as to the payment being a payment of interest as such, then the payment being proved and there being admittedly a document in the handwriting of the defendant from which the fact of the payment appears, the payment must be taken to be a payment on account of principal." That view, I think, is right. In none of the cases where a different view has been taken, was there a document in writing to satisfy the second part of section 20 of the Limitation Act. In this case there is a distinct finding by both the Courts below as regards the payment. If the Judge was right that the evidence did not establish that the payment was made on account of interest as such, still there was evidence establishing the payment *plus* the document in writing proving the fact of payment. On that evidence, the learned Judge was entitled to come to the conclusion that the payment was a part payment on account of principal. As a matter of fact, although not expressed in happy language, the learned Judge has found that this payment was on account of principal because he uses these words:—"The payment of Rs. 10 made on the 20th Magh, 1309 B. S., being in the handwriting of the debtor will be considered as payment towards the principal." When the final Court of Appeal on facts says that the payment will be considered that way, it must be considered that way and considered so for all purposes. It seems to me that the learned Judge, on the materials before

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him, was entitled to come to the conclusion as he did that this payment was a payment towards the principal coming within the meaning of section 20 of the Indian Limitation Act. The present appeal, therefore, fails and must be dismissed with costs.

TEUNON J. I agree.

S. M.

Appeal dismissed.

PRIVY COUNCIL.

DEO NANDAN PRASHAD

v.

JANKI SINGH.

P.C.*
1916Nov. 2, 3 ;
Dec. 7

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Sale for Arrears of Revenue—Act XI of 1859—Co-owners of a share of estate subject to usufructuary mortgage—Mortgagee in possession, undertaking by, to pay revenue—Default deliberately made by agents of minor mortgagee—Purchase at sale for arrears by mortgagee's agents—Benami purchase—Fiduciary relation between mortgagee and mortgagors—Suit by other co-owners to set aside sale—Terms on recovery of property—Contribution towards expenses properly incurred by mortgagee—Duty of counsel in ex parte case—Privy Council, practice of.

Of a 12 annas share of a revenue paying estate, a 3 annas share belonged to the plaintiffs (respondents) subject to a usufructuary mortgage of that share for the benefit of the defendant (appellant) a minor who, as mortgagee in possession, undertook (as was stipulated in the mortgage deed) to pay the revenue to Government for the mortgaged share. The remaining nine annas belonged to others of the plaintiffs. In June 1905, a sum of Rs. 3 annas 6 in excess of the quota payable was paid on the mortgagee's behalf by his agents. In September 1906, only Rs. 9 instead of Rs. 12 was so paid, and that left a balance owing which in due course amounted to an arrear within the meaning of Act XI of 1859 and to recover this arrear the 12 annas estate was sold by the Collector on 25th March 1907 and purchased by the agents benami on behalf of the mortgagee defendant. The High Court, reversing the judgment of the Subordinate Judge who had dismissed the suit, found that the purchase was fraudulent, while their Lordships of the Judicial Committee acquitted the minor of any personal misconduct in relation to the default or sale, and were of opinion that regarding the position as a whole it led to the conclusion that the revenue was intentionally allowed by the agents to fall into arrear with a view to the property being put up for sale and bought on behalf of the minor.

* *Present*: LORD PARKER OF WADDINGTON, LORD SUMNER, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

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Held, that the arrear which occasioned the sale was due to the insufficient payment made in respect of the three annas share, and this was none the less the result of the default of those interested in that share because an excess payment had been made in June 1903 : that had been long absorbed and had ceased to be an excess credit in the touji ledger. However free from personal blame the minor may have been, he could not profit by his agents' deliberate default committed in breach of the terms of his mortgage. As against his mortgagors, therefore, the mortgagee could not be allowed to hold for himself any advantage gained by the default for which his agents were responsible, nor could he be permitted to hold such advantage to the prejudice of the co-owners.

Doorga Singh v. Sheo Pershad Singh (1) dissented from.

Faizur Rahman v. Maimuna Khatun (2) approved.

The mortgagee here through his representatives had a duty to perform which was inconsistent with his becoming a purchaser in the way he did ; his title, therefore, could not operate to the exclusion of his co-owners. It was no answer to say that Act XI of 1859 contemplates a purchase by a co-sharer. The sale would stand, but under the circumstances the transaction was in effect nothing more than payment of an arrear for the benefit of all. But that gave a right to contribution so that it must be a term of granting the plaintiffs' equitable relief that they should contribute to the expenses properly incurred by or for the mortgagee in the purchase of the property.

Where an appeal is heard *ex parte* it is the duty of counsel to bring to the notice of the Board adverse as well as favourable authorities.

APPEAL No. 97 of 1913 from a judgment and decree (18th August 1910) of the High Court at Calcutta, which reversed a judgment and decree (17th June 1908) of the Additional Subordinate Judge of Monghyr.

The first defendant was the appellant to His Majesty in Council.

The main question for determination in this appeal was whether the plaintiffs were entitled to set aside a sale for default of payment of Government revenue under the provisions of Act XI of 1859.

The facts of the case were not in dispute, and were as follows :—Mouzah Tikarampur was assessed with

a Government revenue of Rs. 256. The suit related only to 12 annas of the mouzah which was the ijmalī or joint share paying an annual revenue of Rs. 192, the co-sharer of the remaining 4 annas share having opened a separate account.

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Of the 12 annas share the plaintiffs 17 to 20 owned 3 annas, and they executed a usufructuary mortgage, dated 23rd December 1904, of their share in favour of the appellant who as mortgagee undertook to pay the Government revenue in respect of the mortgaged property. Of portions of that 3 annas share plaintiffs 1 to 6 were the assignees: and plaintiffs 7 to 16 were the owners of the remaining 9 annas share, the revenue of the 12 annas share being paid jointly.

The instalments of revenue were payable in June, September, January and March; the June kist being Rs. 36, the September kist Rs. 48, the January kist Rs. 48, and the March kist Rs. 60. The appellant as mortgagee of 3 annas of the 12 annas joint share had to pay one-fourth of the amount of each kist respectively.

For the instalments due 2nd June 1905, the appellant paid Rs. 12 annas 6, which as he was only liable to pay Rs. 9 was an excess payment by him of Rs. 3 annas 6. For the instalment due on 19th September 1906, he paid Rs. 9 instead of Rs. 12 which with the excess of Rs. 3 annas 6, after paying his full share of the kist left an excess payment by him of 6 annas.

The plaintiffs, however, taking the excess of Rs. 3 annas 6 as having been paid towards the whole sum due for revenue, did not pay their full share of revenue with the result that the amount of revenue due from the 12 annas ijmalī share was not paid in full, and the ijmalī share was ordered to be sold for arrears of revenue under the provisions of Act XI of 1859.

The notices and proclamation required by that Act were duly served and published, and the sale of the 12

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annas ijmal share was held on 25th March 1907, and purchased on behalf of the appellant by his agent.

Some of the plaintiffs appealed to the Commissioner of Bhagalpur, under section 2 of Bengal Act VII of 1868, to set aside the sale on various grounds of appeal: but the Commissioner was of opinion that the sale was valid and the appeal was dismissed on 14th May 1907. The sale was confirmed, and a sale certificate, dated 20th June 1907, was duly issued to the appellant who was put into possession of the property as purchaser.

The suit out of which the present appeal arose was instituted on 14th June 1907, the plaintiffs, after setting out the facts, alleged that the sale was brought about by the fraud of the appellant; that no notice under sections 6 and 7 of Act XI of 1859 had been served according to law, and that the sale was illegal. They prayed for a decree setting aside the sale and giving them possession of the 12 annas ijmal share; or in the alternative that the appellant should be ordered to reconvey the share to them.

The defence was a denial of the plaintiffs' claim, and a contention that the sale was valid.

The Additional Subordinate Judge held that there was no fraud on the part of the appellant in the matter of the sale which had been brought about by the negligence and default of the plaintiffs; that all the necessary notices required by Act XI of 1859 has been duly served; and that the sale was good and valid. He passed a decree dismissing the suit with costs.

The plaintiffs preferred an appeal to the High Court and that Court* (HOLMWOOD and DIGAMBAR CHATTERJEE JJ.) were of opinion that the sale ought to be set aside. They accordingly reversed the decree of the Subordinate Judge and ordered the appellant to execute a re-conveyance of the property in favour

of the plaintiffs on terms specified in the decree. The material portion of their judgment was as follows:—

“ When the plaintiffs took advantage of the Rs. 3 annas 6 lying to their credit there is nothing to show that they were taking anything paid by defendant 1 ; the amount may have accumulated by their own payments in the past. On the other hand, the defendant 1 when making the payment of Rs. 9 instead of Rs. 12 did not ask for credit for the excess payment He was therefore clearly making a default. It is admitted the defendant 1 has made the purchase himself at the sale brought about by the default, as regards the share of the mortgagees, that is, the 3 annas belonging to plaintiffs 17 to 20, and their assignees ; therefore the defendant 1 has no case. He is a trustee for them in the matter of the purchase, and is bound to reconvey on receipt of a fourth of the purchase money with interest at 6 per cent. per annum from the date of the purchase. This would be so whether there was any fraud or chicane on his part or not ; for, in certain respects and for certain purposes the mortgagee in possession is a trustee for the mortgagor, and cannot take advantage of that position to the detriment of the mortgagor. This position of the mortgagee in possession was recognised in the case of *Nawab Sidhu Nuzur Ally Khan v. Ojoodhyaram Khan* (1), and is also supported by section 76 of the Transfer of Property Act (IV of 1882).

“ The shares of the other plaintiffs, however, stand upon a somewhat different footing. The defendant No. 1 was not their mortgagee, and it is contended that he was not, therefore, in the same relation of confidence and trust as regards their shares and ought to be allowed to retain these at least. So far as the non-mortgagor plaintiffs are concerned, the position of defendant No. 1 was, it has been contended, not worse than that of a co-sharer, and reliance has been placed upon the case of *Doorga Singh v. Sheo Pershad Singh* (2), where Banerji J. is said to have laid down that a co-sharer has no duty to pay up his quota of the Government revenue for the purpose of saving the shares of his co-sharers and may purchase for himself at the revenue sale. This opinion, however, has been qualified by a subsequent decision of Brett and Mookerjee JJ. in Appeal from Original Decree No. 545 of 1904 decided on the 28th of August 1907. The learned Judges say ‘ we think that if the term fiduciary character be used in its broadest sense, this (case) goes too far, for we consider that it is not possible to hold that between co-sharers in a joint estate all being liable to pay their quota of the Government revenue according to their respective shares, no relation of mutual confidence exists. Otherwise the position of co-sharers in a revenue-paying estate, if they were always open to le

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(1) (1866) 10 Moo. I. A. 540.

(2) (1889) I. L. R. 16 Calc. 194.

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overreached and deceived by their co-sharers would be intolerable.' We entirely agree with this view of the position of a co-sharer or a revenue-paying estate in relation to his co-sharers, and the importance of this qualification is apparent when a co-sharer by suffering a default intentionally allows the property to be sold, and makes the purchase for himself to the exclusion of his co-sharers. It has been held in England that if one of two joint purchasers of an estate acquires an encumbrance upon the property on profitable terms, the acquisition must enure to the benefit of both. See *Carter v. Horns* (1), and *Lewin on Trusts*, 303, 11th Edition.

"In the case of *Kadim v. Sheemonog* (2), it was held that a mortgagee in possession of a portion of joint undivided estate is bound to pay up an arrear of revenue due on another portion, and if he does not do so and the entire estate is farmed by the Collector to him he must account as mortgagee in possession for the profits of the farm.

"Even, therefore, if the defendant No. 1 be considered in the light of a co-sharer, he must share the acquisition with his other co-sharers. But he is not a co-sharer: he is a trustee for a co-sharer and can derive no benefit for himself by committing a breach of trust. The property comes to him through a polluted channel, and a Court of Equity will not allow him to soil his hands by retaining any portion of the ill-gotten profits.

"But there is a stronger ground in this case. We think the purchase was fraudulent. The defendant No. 1 is himself the owner of a 3 annas putti of the mouzah, and his putti is contiguous to the disputed putti of 1 anna. It would be very convenient for him if he could acquire the disputed property. So his shrewd agents began to lay their trap. There was, it is true, simple breach of a contractual duty to plaintiffs Nos. 17-20 in the making of the short payment: but the defendant was bound to give notice to his mortgagors that he was making the short payment and warn them of the risk to which he was exposing them. If he had done so, the mortgagors who subsequently paid larger amounts, would have easily paid the small amount of arrear and averted the sale. He did not apply to the Collector to give him credit for the excess, if any. If he had done so, he might have had the credit or been told that he could not get it. He knowingly made the payment in a wrong name through an unknown person: what was the object of this falsehood? There is no explanation why this subterfuge was adopted, no evidence who Raghunath Sahai was and why the payment was made in the name of a person who had no account with defendant No. 1.

"The purchase was made for 425 rupees only and the value of the

(1) (1728) 1 Eq. Ca. Abr. 7.

(2) (1854) S. D. A. (N.-W. P.) 164.

property is not less than 8,000 rupees. The mortgage of 3 annas was for 600 rupees, therefore the 12 annas could be mortgaged for 2,400 rupees at least : then 2 annas was sold for 1,266 rupees, so the 12 annas could be sold for 7,596 rupees at least. The evidence as to the value is entirely one-sided, and no serious attempt was made to gainsay it. There was breach of duty to begin with : there was concealment and there was consequent profit. We have no hesitation in holding that the sale and purchase was fraudulent, and the defendant No. 1 cannot be allowed to retain his ill-gotten bargain. We, therefore, order that on the plaintiffs paying into Court the sum of Rs. 425 with interest at 6 per cent. per annum from the date of sale within 3 months from this date, the defendant No. 1 through his certificated guardian shall convey the disputed property to the plaintiffs under one deed of sale, without stating what the share of each particular plaintiff is but entitling each to get what was his at the time of the sale or what he subsequently acquired by a valid title. The plaintiffs must pay the costs of the reconveyance. The defendant No. 1 must account for the profits enjoyed by him in respect of the 9 annas share of plaintiffs Nos. 7 to 16 : the amount of such profits may be determined in execution. The plaintiffs are entitled to their costs in both Courts against defendant No. 1."

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On this appeal, which was heard *ex parte*,

De Gruyther, K. C., and *B. Dubé*, for the appellant, contended that the High Court had erred in finding that the sale was fraudulent owing to the appellant's action. Only general charges of fraud were made in the plaint, which was not sufficient for a finding of fraud: *Gunga Narain Gupta v. Tiluckram Chowdhry* (1) There was no evidence of fraud by the appellant who was under no obligation to protect the estate on behalf of the other co-sharers; reference was made to section 76 of the Transfer of Property Act 1882. The sale was brought about, it was contended, by the default of the plaintiffs themselves who were not entitled to take advantage of the excess payment made by the appellant. If that sum paid in excess were credited to him as it should have been, there would have been no default, as he would have paid all

(1) (1888) I. L. R. 15 Calc. 533 ; L. R. 15 I. A. 119

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the revenue he had agreed to pay as usufructuary mortgagee. Even intentional default would not be fraud, and if the appellant caused the sale by paying only Rs. 9, instead of Rs. 12, it would not disentitle him to purchase at the sale. Reference was made to *Doorga Singh v. Sheo Pershad Singh* (1), *Ram Lall Mookerjee v. Debendra Nath Chatterjee* (2); and section 53 of Act XI of 1859 which it was contended expressly allowed him to purchase property sold on default of payment by another co-sharer. Section 90 of the Indian Trusts Act (II of 1882) only applied to the case of a co-sharer or mortgagee gaining an advantage by making use of his position to do so. The sale it was submitted was perfectly good and valid, and should not have been set aside.

The judgment of their Lordships was delivered by
Dec. 7. SIR LAWRENCE JENKINS. This suit relates to a 12-annas share of Mouzah Tikarampur, Pergunnah Monghyr being Towzi No. 5298. The property was offered for sale in the Collectorate of Monghyr, for the recovery of arrears of revenue, under the provisions of Act XI of 1859 on the 25th March, 1907, and was bought for the defendant, Babu Deo Nandan Prashad, a minor, in the name of Bunwari Lal. Before the sale it belonged as to 9 annas to the plaintiffs 7 to 16, and as to the remaining 3 annas to the plaintiffs 17 to 20, subject to a usufructuary mortgage of these 3 annas for the benefit of Deo Nandan, and to transfers of parts to the plaintiffs 1 to 6.

The suit, which impugns the sale, failed in the Court of first instance, but on appeal the plaintiff's claim was upheld, and a decree was passed on the 18th August, 1910, that Deo Nandan, through his

(1) (1889) I. L. R. 16 Calc. 194, 198. (2) (1881) I. L. R. 8 Calc. 8, 11.

certificated guardian, do convey the property to the plaintiffs.

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From this decree Deo Nandan has preferred this appeal. At one time the property was part of a larger estate, but there was a separation of shares under Act XI of 1859, and thereby the 12-annas share now in suit became subject to a Government revenue of 192 rupees, payable in four quarterly instalments.

Though the liability to the Government was, and continued to be, joint, yet, as between themselves, it was distributed among the several co-owners in proportion to their respective shares. Thus the amount payable in respect of the 3-annas share was a fourth, that is to say, 9 rupees in June, 12 rupees in September, 12 rupees in January, and 15 rupees in March. The mortgage of the 3-annas share for the benefit of Deo Nandan was executed on the 23rd December, 1904, and it was thereby stipulated that the mortgagee should, by remaining in possession from 1312F. up to the repayment to him of the entire debt thereby secured, collect and realise the rent of the mortgaged Mouzah, estimated as not exceeding 150 rupees, and should pay out of it 51 rupees 8 annas into the Collectorate for revenue and other public demands.

In June 1905, 9 rupees became payable by the mortgagee, but 12 rupees 6 annas was paid. The reason of this excess payment does not appear. At the end of the four following instalments there were no arrears.

But of the instalment payable in September 1906, only 9 rupees instead of 12 rupees was paid on behalf of the mortgagee. As the other co-owners paid their several aliquot shares and no more, there was, after giving credit for advance payments from previous instalments, a balance still owing of 2 rupees 10 annas

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This became in due course an arrear of revenue as defined by the Act, and it was to recover this arrear that the property was sold by the Collector.

The arrear, therefore, which occasioned the sale, was due to the insufficient payment made in respect of the 3-annas share, and none the less was this the result of the default of those interested in that share, because in June 1905 an excess payment of 3 rupees 6 annas had been made. This excess had long been absorbed, and had ceased to be an excess credit in the Towzi ledger. This, in effect, is the view expressed in the judgment under appeal, and it is made a basis of the High Court's decision in the plaintiffs' favour. The learned Judges, as a further and distinct ground of decision, find that there was fraud, and the language used by the High Court, read literally, might be understood to attribute personal fraud to the minor, Deo Nandan. But, in view of his age, this can hardly have been intended. In any case their Lordships acquit him of any personal misconduct in relation to the default or sale. He was, however, represented by agents, and when the position created by them is regarded as a whole, it leads to the conclusion that the Government revenue was intentionally allowed by them to fall into arrear with a view to the property being put up for sale and bought on behalf of the minor. If this be the true view, as their Lordships hold, then, however free from personal blame the minor may have been, he cannot profit by his agents' deliberate default committed in breach of the terms of the mortgage. As against his mortgagor, therefore, the mortgagee cannot be allowed to hold for himself the advantage gained by the default for which his agents were responsible. Nor, in their Lordships' opinion, can he be permitted to hold for himself this advantage to the prejudice of the co-owners. For this purpose

the mortgagor and mortgagee may be identified; they together represented the 3-annas share, and theirs was the obligation to pay their quota of the revenue. Equally in relation to the co-owners was the default designed with a view to a subsequent sale and to a purchase on the minor's behalf, and the advantage gained by this scheme must, in like manner, be held for the benefit of the co-owners, who are not shown to have been aware of the default or sale, or to have disintitiled themselves to this equitable relief. They had contributed their proper quota to this September instalment, and it cannot be supposed that had they known of the default or the peril to their interests they would have allowed a valuable property, worth, it is said, not less than 8,000 rupees, to be sold away for the failure to pay 2 rupees 10 annas.

In estimating the conduct of the parties it is not without significance that while the co-owners of the other shares paid in full their contribution to the succeeding January instalment, nothing was paid on account of the 3-annas share.

Their Lordships have not overlooked the decision in *Doorga Singh v. Sheo Pershad Singh*(1), which lends support to the appellant's contention as against the co-owners; but it is apparent from the judgment under appeal that this decision has not stood unquestioned. And this also appears from the judgment in *Faizar Rahman v. Maimuna Khatun*(2). This case was not cited in the course of the argument, as the respondents were not represented, but their Lordships wish it to be distinctly understood that where an appeal is heard *ex parte* it is the duty of counsel to bring to the notice of the Board adverse as well as favourable authorities.

The decision in *Doorga Singh's Case* (1) applied too

(1) (1889) I. L. R. 16 Calc. 194.

(2) (1913) 17 C. W. N. 1233.

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lax a standard of reciprocal conduct in holding that fraud in its strictest sense, such fraud as would support a common law action of deceit, was the test by which to judge these transactions. It failed to pay due regard to the relative position of co-owners in respect of the payment of revenue and to the need of demanding from each such measure of candid dealing and good faith as would ensure that a sharer would not be tempted to make a deliberate default with a view to ousting his co-sharers and appropriating to himself their common property. Here Deo Nandan, through his representatives, had a duty to perform, which was inconsistent with his becoming a purchaser of the property in the way he did, therefore his title cannot operate to the exclusion of the co-owners.

It is no answer to say that the Act contemplates a purchase by a sharer; the sale stands, but in the circumstances the transaction is in effect nothing more than payment of an arrear of revenue enuring for the benefit of all. But this gives a right to contribution, so that it must be a term of granting the plaintiffs' equitable relief that they contribute to the expenses properly incurred by or for Deo Nandan in the purchase of the property.

The amount to be contributed has been fixed by the High Court's decree at 425 rupees with interest at 6 per cent. per annum within three months. As no exception has been taken to this, either by way of cross-appeal or otherwise, it may be accepted, but the time for payment must be fixed by the Subordinate Judge after notice to the parties. The declaration in the decree that the sale and purchase is invalid is misconceived as a description of the legal position, and in its place should be substituted a declaration that the property purchased must be held for the benefit of the plaintiffs and the first defendant according

to their several interests at the date of the sale, subject to the repayment of 425 rupees, and interest on that sum at the rate of 6 per cent. per annum from the date of the sale, and there should be a direction for a conveyance as decreed by the High Court on payment of that amount on or before a date to be fixed by the Subordinate Judge. With this variation the decree of the High Court should, in their Lordships' opinion, be affirmed, and they will humbly advise His Majesty to this effect.

J. V. W.

*Decree varied.*Solicitors for the appellant : *Watkins & Hunter.*

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P.C.^o
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Nov. 6, 7 ;
Dec. 8.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Grant—Grant by zamindar of Talabi Brahmottar tenure antecedent to Permanent Settlement—Tenure, permanent, hereditary and transferable—Grantee, rights of, to minerals—Absence of express evidence that they formed part of the grant—Protraction of Indian litigation.

A "grant" in India has not the special and technical meaning attached to the same word in English law.

A Talabi Brahmottar grant of a zamindar's village at a fixed rent made before the Permanent Settlement by the then Raja of Pachete to the predecessors in title of the appellant, although found to be a permanent, hereditary and transferable tenure, was *held* (affirming the decision of the High Court) not to carry with it the mineral rights in the soil. Minerals

* *Present* : THE LORD CHANCELLOR (LORD BUCKMASTER), LORD ATKINSON, LORD WRENBURY AND MR. AMEER ALI.

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will not be held to have formed part of the grant, in the absence of express evidence to that effect.

Hari Narayan Singh Deo v. Sriram Chakravarti (1) and *Durga Prasad Singh v. Braja Nath Bose* (2) followed.

Protraction of Indian litigation deprecated.

APPEAL No. 26 of 1915 from a judgment and decree (11th July 1911) of the High Court at Calcutta, which reversed a judgment and decree (16th May 1906) of the Court of the Subordinate Judge of Burdwan.

Some of the defendants were the appellants to His Majesty in Council.

The question for determination in this appeal was whether the first respondent, Raja Jyoti Prasad Singh Deo, is the proprietor of the mineral rights appertaining to mauza Panchgachia, which is admittedly situate within the ambit of his proprietary zamindari estate known as the Pachete Estate and is a part thereof, in the absence of any evidence on the part of the appellants who are the permanent tenure-holders at a fixed rent of the said mauza, that the zamindar Raja or his predecessor ever parted with the mineral rights.

The case before the High Court (COXE and TEUNON JJ.) will be found reported under the name of *Jyoti Prasad Singh v. Lachipur Coal Company* in I. L. R. 38 Calc. 845, where the facts are sufficiently stated.

The High Court held that in the absence of evidence of the actual terms of the lease the mineral rights must be regarded as the property of the Raja.

On this appeal,

A. M. Dunne, for the appellant. The nature of the tenure which the appellants hold in this case is an ancient Moguli Brahmottar, having its origin in a

(1) (1910) I. L. R. 37 Calc. 723 ; (2) (1912) I. L. R. 39 Calc. 696 ;
L. R. 37 I. A. 136. L. R. 39 I. A. 133.

gift or grant to Brahmins, carried out by a conveyance of the village on certain terms. It is not strictly a tenancy of any description under a lease. Both Courts in India have found that the appellants are tenure-holders, paying a small rent, and that their tenure is permanent, hereditary and transferable. The suit is based on the village, being a rent-paying village and the appellants are called lessees in the plaint. But both Courts in India have found it is not a rent-paying village. It is a grant of the land itself, the only right left in the zamindar-grantor being the right to the rent: *Sonet Kooer v. Himmut Bahadoor* (1). For the definition of a Brahmottar grant reference was made to Wilson's Glossary; Field's Introduction to the Bengal Regulations; Glossary to the 5th Report, Vol. II; and Hunter's Statistical Abstract of Bengal, Vol. XVII, pages 322, 333 (Moguli) and 368 (Talabi). Bengal Regulation I of 1793 preamble and sections 1 and 3; and *Nil Madhab Sikdar v. Narattam Sikdar* (2) were also referred to. When the grant was made the zamindar was the proprietor of the land in the village, and possessed the minerals, which, it was submitted, passed to the defendants (appellants) under the grant made to them: *Megh Lal Pandey v. Rajkumar Thakur* (3). In *Hari Narayan Singh v. Sriram Chakravarti* (4), the tenure was not a permanent one, and the judgment proceeded on the footing that there was no permanent, transferable and hereditary tenure. In *Durga Prasad Singh v. Braja Nath Bose* (5), there was a service tenure. Those cases therefore do not determine the point now raised: *Kunja Behari Seal v. Durga Prasad*

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| (1) (1876) I. L. R. 1 Calc. 391 ;
L. R. 3 I. A. 92. | (4) (1910) I. L. R. 37 Calc. 723 ;
L. R. 37 I. A. 136. |
| (2) (1893) I. L. R. 17 Calc. 826. | (5) (1912) I. L. R. 39 Calc. 696 ; |
| (3) (1906) I. L. R. 34 Calc. 358. | L. R. 39 I. A. 133. |

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Singh (1) and *Nowaghur Coal Co. v. Sashi Bhusan Ray* (2), follow *Hari Narayan Singh v. Sriram Chakravarti* (3), and therefore are not authorities against the present contention. *Kally Dass Ahiri v. Monmohini Dasse* (4) is the only case which decides that a permanent lease is liable to forfeiture on the tenant's denial of his landlord's title. Under the circumstances of the case, it was submitted, it should be held that the right to the minerals was vested in the appellants. *Abhiram Goswami v. Shyama Charan Nandi* (5) was also referred to.

Sir R. Finlay, K.C., De Gruyther, K.C., J. M. Parikh and *Arfan Ali*, for the plaintiff respondent, contended that the appeal was concluded by the decisions of the Board in *Hari Narayan Singh v. Sriram Chakravarti* (3) and *Durga Prasad Singh v. Braja Nath Bose* (6). In the former case the High Court in *Sriram Chakravarti v. Hari Narayan Singh* (7) had decided that the debotter tenure, as it was there, was permanent, hereditary and transferable, and that where that was the nature of a tenure, the minerals passed to the tenure-holder, and this Board in reversing that decision dealt with both points, and held on the second point that even if the tenure were permanent, hereditary and transferable, the right to the minerals remained in the zamindar until it was clearly proved that he had parted with them. Lord Macnaghten was a party to that decision, and in delivering the judgment in the later case, *Durga Prasad Singh v. Brajanath Bose* (6), he took the same view, reversing the decision of the High Court

(1) (1914) I. L. R. 42 Calc. 346.

(5) (1909) I. L. R. 36 Calc. 1003 ;

(2) (1914) 19 C. W. N. 375.

L. R. 36 I. A. 148.

(3) (1910) I. L. R. 37 Calc. 723 ;

(6) (1912) I. L. R. 39 Calc. 696 ;

L. R. 37 I. A. 136.

L. R. 39 I. A. 133.

(4) (1897) I. L. R. 24 Calc. 440.

(7) (1905) I. L. R. 33 Calc. 54

in *Brajanath Bose v. Durga Prasad Singh* (1). Those two decisions of this Board have since been followed in the cases of *Kunja Behari Seal v. Durga Prasad Singh* (2) and *Nowaghur Coal Co. v. Sashi Bhusan Ray* (3). Even assuming that the two decisions of the Board above cited are distinguishable and do not cover the present appeal, the respondents, it was submitted, were entitled to succeed. The permanent settlement was made only with persons who were proprietors of the land, and those holding under them were lessees. Under the Bengal Tenancy Act (VIII of 1885) the respondent and the appellant were landlord and tenant respectively. If the appellant held an agricultural tenancy, he would be prevented from owning the minerals by section 5 of the Act. If the tenancy was a non-agricultural tenancy, he was excluded from the mines under section 108 (o) of the Transfer of Property Act, which incorporates the law as to minerals as it stood before the passing of that Act. Reference was made also to the Bengal Tenancy Act, sections 4, 6, 10, 11, 18, 19, 20, 65 and 73. A permanent tenure is not a conveyance in fee simple: see *Abhiram Goswami v. Shyama Charan Nandi* (4), where *Kally Dass Ahiri v. Monmohini Dassee* (5) is approved; from which it appears that a permanent tenure-holder has not all the rights of the proprietor subject only to the payment of rent. The predecessors of the appellants were lessees and in that character in 1808 obtained a decree in a suit brought by them under section 5 of Bengal Regulation VIII of 1793 against the predecessor of the respondent plaintiff.

Dunne replied.

- (1) (1907) I. L. R. 34 Calc. 753. (4) (1909) I. L. R. 36 Calc. 1003, 1015;
 (2) (1914) I. L. R. 42 Calc. 346. L. R. 36 I. A. 148 156.
 (3) (1914) 19 C. W. N. 375. (5) (1897) I. L. R. 24 Calc. 440.

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The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. The appellants in this case are the descendants and representatives of certain Brahmins to whom, at a date uncertain, but antecedent to 1790, the then Raja of Pachete made a *mokurari* grant of the village known as Mauza Panchgachia; the question raised in this appeal is whether this grant carried with it the mineral rights in the soil.

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In considering the question, it is important to avoid giving the words used in connection with legal transactions in India the special and technical meaning that they possess in this country. According to our law, the word "grant" is strictly applicable to the conveyance at common law of remainders, reversions, and incorporeal hereditaments, which do not lie in livery, or of which livery could not be given. But in connection with the present dispute, the word has no such meaning, and it is important at the outset to bear this in mind.

The grant under which the appellants claim cannot be found, nor is there any copy in existence, nor any record of its literal contents. It is, however, admitted that the grant was a Talabi Brahmottar grant.

Such a grant is defined in Wilson's Glossary as "land granted rent-free to Brahmins for their support and that of their descendants, probably as a reward for their sanctity of living or to enable them to devote themselves to religious duties and education."

If after the words "rent free" be added the words "or at a fixed rent," this statement may be accepted as an accurate description of the origin of the grant, but in itself it contains no definition of the characteristics of the tenure. It has, however, been found in the present case that the tenure of the lands in dispute is permanent and heritable, and confers upon the holder for the time being full rights of

alienation ; but even these findings, though they invest the tenure with attributes of absolute ownership, afford little assistance in determining what it was that the grant passed.

Now, by the permanent settlement of 1793, all the mineral rights were confirmed to the zemindars, and the first respondent to this appeal represents their interest in the estate. If such rights were already possessed and recognised at the date of the settlement this confirmation would hardly have been needed, and this suggests that up to that date the rights enjoyed and granted in the lands were not considered as including the minerals ; if this were so, as the grant in question could have created no rights in the property which the grantor did not possess, no right to the minerals could have been conferred. However that may be, there is certainly nothing in the permanent settlement to which the appellants can turn in support of their contention. Indeed, apart from the evidence furnished from the Sarsikal Jumma, and the facts that have been stated as to the well-recognised attributes of a Brahmottar grant, the appellants have been unable to furnish any evidence at all in support of the view that the grant conveyed the minerals ; their case really depends upon the assumption that the character of the grant itself is sufficient to establish their claim.

This question has been the subject of much controversy in the Indian Courts, and the appellants can certainly point to some powerful and well-reasoned judgments in support of their view. But, in their Lordships' opinion, the matter has been set at rest by the decision of the Judicial Committee. In the case of *Hari Narayan Singh Deo v. Sriram Chakravarti* (1), a question arose as to the ownership of the minerals underlying a certain village called Petena which had

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been granted to an idol of whom the Goswamis were the priests. In that case, as in this, the grant was not forthcoming, but it was held in the High Court that the tenure of the Goswamis gave them permanent, heritable and transferable rights and, upon this finding, the High Court decided that the minerals had passed under the original gift. Upon appeal to the Privy Council this judgment was questioned upon two grounds. *First*, that there was no evidence that the tenure carried with it permanent, heritable and transferable rights; and *secondly*, that, even if this contention were wrong, in the absence of express evidence that the creation of the tenure was accompanied with the grant of the minerals, the minerals did not pass. The Judicial Committee decided in favour of the appellants' contention, and the material part of the judgment is to be found on p. 145 of the report. The two points are there dealt with, and upon the first Lord Collins, in delivering the judgment of the Board, made this statement:—

"On this meagre foundation of fact the two Judges who constituted the High Court, have built up the theory that the Goswamis were tenure-holders having permanent, heritable and transferable rights."

He then proceeds to deal with the judgment of Mr. Justice Pargiter, who took the view that the creation of such a grant carried with it the mineral rights; and he expresses disagreement with this view of the law, stating that it appeared to ignore the distinction between the mere tenure-holder and the zemindar; the judgment concludes by saying that the zemindar must be presumed to be the owner of the ground rights in the absence of evidence that he ever parted with them. The counsel for the appellants has strongly urged that the whole of this judgment depends upon their Lordships refusing to accept the view that the tenure in that case was permanent,

transferable and heritable, and that the judgment only applies to an estate lacking those qualities. Their Lordships realise that the judgment, in the absence of the argument, might be open to this construction ; but, read in the light of the then appellants' contention, they think that the two passages referred to dealt with the two separate points which were raised by the appellants, and that the latter part of the judgment was really independent of the statement which expressed dissatisfaction with the conclusion drawn as to the character of the tenure. Their Lordships would have felt more uncertainty about this view had it not been for a second judgment in a subsequent case, *Durga Prasad Singh v. Braja Nath Bose* (1).

In that case also the nature of the grant was not identical with that of the grant in the present case. It was the grant to the holders of an office—the office of Digwar, and it was permanent only in the sense that, so long as that office continued to be held by members of the same family, the rights created by the grant would be assured to the holders for the time being of the office. In that case the High Court followed the decision of the High Court in the former case, which had not then been reversed, and Lord Macnaghten, in giving the judgment reversing the High Court, referred to that fact in the following terms:—

“The learned Judges on appeal seem to have been misled by a decision of the High Court in the case of *Hari Narayan Singh Deo v. Sriram Chakravarti* (2) which was afterwards reversed by this Board. There certain persons, called Goswamis or Gossains, priests of a Hindu idol to which a certain village had been assigned on a permanent *debottar* tenure at a small annual rent, granted a lease of the underlying minerals. The High Court held that the mineral rights were vested in the Gossains. But it was laid down by this tribunal that it must be presumed that the

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(1) (1912) I. L. R. 39 Calc. 696 ; (2) (1910) I. L. R. 37 Calc. 723 ;
L. R. 39 I. A. 133. L. R. 37 I. A. 136.

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mineral rights remained in the zemindar in the absence of proof that he had parted with them."

It is plain from this statement by Lord Macnaghten, who was one of the members of the Board in the former case, that the earlier decision was intended to apply to a permanent *debottar* tenure. In other words, that the doubt that was thrown in the former case as to the sufficiency of the evidence on which the tenure had been held to be permanent, heritable, and transferable, did not affect the main judgment in the case, which was based upon the hypothesis that these attributes of the tenures had been established.

These decisions, therefore, have laid down a principle, which applies to and concludes the present dispute. They establish that when a grant is made by a zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect.

It is admitted in the present instance that the only evidence that can be relied on arises from the characteristics of the tenure and the statement as to the object and purpose for which the grant was made as stated in Wilson's Glossary. For reasons that have already been given, this affords no evidence necessary for the purpose, and their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

In conclusion their Lordships desire once more to call attention to the tedious protraction of Indian litigation. It can only be a misfortune that a dispute such as the present, which affects a matter so important as the right of mining—a right of great value for the development and prosperity of any country—should have been in abeyance for a period which, from the

commencement of the present dispute until the day of hearing of this appeal, has exceeded twelve years.

Appeal dismissed.

Solicitors for the appellants: *Watkins & Hunter.*

Solicitor for the plaintiff-respondent: *Edward Dalgado.*

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FULL BENCH.

Before Sandersson C.J., Woodroffe, Mookerjee, Chaudhuri and Newbould JJ.

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Jurisdiction of High Court—Criminal Procedure Code (Act V of 1898), ss. 185, 527, scope of—“Doubt,” meaning of—Transfer—Questions of convenience and expediency—Power of the High Court over Courts outside its territorial limits—Form of order.

Held by the majority (WOODROFFE J. dissenting). The High Court has power under section 185 of the Criminal Procedure Code to make an order in respect of an enquiry instituted or trial commenced in a Court situated beyond its territorial limits.

Hiran Kumar Chowdhury v. Mangal Sen (1) *Emperor v. Chaichal Singh* (2) approved.

Section 185 is not restricted to proceedings instituted in a Court subordinate to the High Court where the application is made. The section invests that High Court with authority to determine the question within the local limits of whose Appellate Criminal Jurisdiction the offender actually is.

* Reference to Full Bench in Criminal Revision No. 848 and Miscellaneous No. 92 of 1916.

(1) (1912) 17 C. W. N. 761.

(2) (1909) 9 Cr. L. J. 581.

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Where jurisdiction is given to more Courts than one for the same offence, if a doubt arises as to the Court by which such offence should be tried, it must involve a doubt as to the suitability of one Court as compared with another from the point of view of "convenience" and "expediency."

Rajani Benode Chakravarti v. All-India Banking and Insurance Company, (1) dissented from.

The order should be limited to a declaration that the case should be inquired into or tried by the Court of the Chief Presidency Magistrate in Calcutta. This will leave it open to the prosecution or the applicant to take such steps as they may be advised.

Per WOODROFFE J. Section 185 does not deal with transfer or decisions on the ground of mere convenience raised by the accused but with doubt as to competency. Section 185 is not designed to cut down admitted jurisdiction but to determine cases where the facts said to constitute jurisdiction are doubtful. These provisions deal with jurisdiction and not with convenience.

Per MOOKERJEE, J. The two sections (ss. 185 and 527) have entirely different scopes. In the first place, the order under section 527 is an executive order which may be made without opportunity afforded to the accused to be heard. In the second place, section 527 contemplates an order for transfer, and recourse may possibly be had thereto if an order made by one High Court under section 185 is disregarded by another.

REFERENCE to Full Bench by Chaudhuri and Newbould JJ.

This was a Rule calling upon the District Magistrate of Karwar, in the Presidency of Bombay, to show cause why the proceedings against the petitioner should not be transferred to the Court of the Chief Presidency Magistrate, Calcutta, and the alleged offence enquired into and tried in Calcutta or why such other order should not be passed as to this Court may seem fit and proper.

The Rule came on for hearing before Chaudhuri and Newbould, JJ. Their Lordships referred the case to a Full Bench as it involved an important question of jurisdiction on which two reported decisions of this Court had taken different views, and as also their

Lordships did not agree on the question of convenience.

The order of reference was as follows:—

This Rule was issued in exercise of the Court's powers under section 185 of the Code of Criminal Procedure, and one of the points to be considered is, what powers we have under this section. This section is in the following terms:—"Whenever any doubt arises as to the Court by which any offence should under the preceding provisions of this chapter be enquired into or tried, the High Court within the local limits of whose jurisdiction the offender actually is, may decide by which Court the offence shall be enquired into, or tried." In the case of *Rajani Benode Chakravarti v. The All-India Banking and Insurance Company* (1) it was held by a Divisional Bench of this Court consisting of their Lordships Imam and Chapman JJ., that section 185 of the Criminal Procedure Code, did not warrant interference by this Court on the ground of convenience, when two Courts were equally competent to exercise jurisdiction in the matter. But in the case of *Hiran Kumar Chowdhury v. Mangal Sen* (2) another Divisional Bench of this Court consisting of their Lordships Chitty and Richardson JJ., granted a similar application. They held that they might properly make an order under this section transferring a case from the Court in another province where it had been instituted to a Court in this province on the ground of convenience, when the Court at either place would have jurisdiction. The only other ruling on this point that we have been able to discover is that of *Emperor v. Chaichal Singh* (3) which was cited on behalf of the petitioner. In that case it was held that the section is not restricted to cases in which there is doubt as to whether one Court or another has jurisdiction, but includes cases in which the doubt is on the point whether the choice between the two Courts, both of which have jurisdiction, should be decided on the ground of general convenience. In our opinion this view is correct. We think with due respect that the learned Judges who decided the case of *Rajani Benode Chakravarti v. The All-India Banking and Insurance Company* (1) overlooked the effect of the words "should under the preceding provisions of this chapter be enquired into and tried" in section 185. A reference to the preceding sections shows that a question of doubt as to jurisdiction can seldom arise, as provision is made that in the event of circumstances, which otherwise would have made it doubtful where the trial should be held, it can be held in any of the several Courts to whom jurisdiction is given by these sections. But these provisions giving jurisdiction to more

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(1) (1913) I. L. R. 41 Calc. 305 ; (2) 1912) 17 C. W. N. 761.

17 C. W. N. 1207.

(3) (1909) 9 Cr. L. J. 581.

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Courts than one for the same offence must necessarily create a possibility of doubt as to which Court can more conveniently in the interests of public justice exercise that jurisdiction. It seems to us that "the doubt as to the Court by which any offence should under the preceding provisions be enquired into or tried," includes, in the ordinary sense of the words, a doubt as to the suitability of one Court compared with another and is not limited to a doubt as to jurisdiction. We are, therefore, substantially in agreement with the decision of this Court in the case of *Hiran Kumar Chowdhury v. Mangal Sen* (1). Our only doubt is as to the correctness of the form of the order made in that case, that is to say, whether we could expressly order the transfer of the case from a Court outside our jurisdiction to one within it. If we made an order under this section we think it ought to be of a declaratory nature, leaving it to the prosecution to take the necessary steps to enable the Court of the Chief Presidency Magistrate to assume jurisdiction.

As this case involves an important question of jurisdiction when the two reported decisions of this Court have taken practically opposite views, we think it is a fit case for reference to a Full Bench of this Court, under Part II, Chapter V, Rule V of our rules, for such orders as to such Bench may seem fit.

We have also to state that we are not agreed on the question of convenience and append our separate judgments on that point.

We agree that as the matter is being referred to a Full Bench, that Bench should also consider the question of convenience, if necessary, to decide it, instead of having a separate reference to a third Judge. The points, therefore, for the determination of the Full Bench are as follows :—

(i). Is the decision in *Rajani Binode Chakravarti v. The All-India Banking and Insurance Company* (2) correct ?

(ii). Is the form of the order in *Hiran Kumar Chowdhury v. Mangal Sen* (1) correct ? If not, what is the correct form of the order ?

The further point for consideration is—

(iii). Has the accused made a sufficient case for an order under section 185 of the Criminal Procedure Code, on the ground of convenience ?

Their Lordships expressed their dissentient views, as to the justification of a transfer of this case, as follows :—

CHAUDHURI J. I would make the Rule absolute and transfer the case on the following grounds :—

I do not clearly understand what the charge really is against the petitioner. The explanation of the Magistrate of Karwar on this point

(1) (1912) 17 C. W. N. 761.

(2) (1913) I. L. R. 41 Calc. 305.

is vague and somewhat shadowy. The notes made by the District Superintendent of Police contained in a document headed "points to refute" do not give much help. Mr. Camell, appearing on behalf of the Crown, states he has not sufficient instructions in the matter and can give no further help. The accused has not been able to get from the prosecution any particulars relating to the nature of the charge. The record of the criminal case consists of the charge-sheet which does not state the case. I consider the evidence of the witnesses, mentioned by the Magistrate, is likely to be of a formal nature. Admittedly the case depends mostly on documentary evidence and the books of the Company. The accused is the principal officer in charge of the Company which has its main office in Calcutta. His removal and the removal of his books, would mean the stoppage of the business, which involves the interest of a large number of policy-holders. The affairs of the Company are also under investigation by the Registrar in Calcutta. Weight ought to be attached to the offer of the defence to bear the expense of the examination of necessary witnesses in Calcutta. The accused also suggests that a commission may be issued for the examination of the Karwar witnesses. The prosecution has been undertaken and the expense is being borne by the Crown. It is to be noted that section 185 provides a safeguard so far as the accused is concerned; namely, to prevent his harassment. The case against the Sub-Agent was started some time ago at Karwar, and it seems to me that the prosecution had ample time to be able to frame or indicate the nature of the case against the accused. The indefinite character of the case, taken with the other circumstances, specially the stoppage of the business of the Company, appears to me to be sufficient ground for transferring the case to Calcutta, specially as the doubt on the question of jurisdiction arises from the failure on the part of the prosecution to define the nature of the charge.

NEWMOULD J. I hold that on the merits the Rule must be discharged. I quite appreciate that it would be far more convenient for the petitioner to be tried in Calcutta. But we have to consider the balance of convenience and the interests of justice and it would be a greater hardship to the prosecution witnesses to compel them to attend a trial here, on the following grounds :—

A large number of these witnesses are poor and illiterate and not conversant with any language except their mother tongue, while the petitioner is an educated gentleman of means. He has offered through his counsel to bear the extra expense that the trial of the case in Calcutta would involve. But the trouble that will be caused to witnesses of this class by keeping them in a strange country, 1,800 miles from their home, for a considerable period could not be suitably remedied by monetary compensation. It is contended that they are not important witnesses and

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might be examined on commission. Our attention has been drawn to remark of the Magistrate, Karwar town, in his order of the 31st July, to the effect that the case against the petitioner seems to depend mostly on documentary evidence. In passing this order the Magistrate was, it appears, only considering the question of bail. I do not think the Magistrate meant more than that the proof of criminal liability of the petitioner would principally depend on documentary evidence. It will have to be proved in the presence of the petitioner, before he can be convicted, that the offences charged have been committed, as well as his personal criminal liability. Proof of the commission of those offences will depend directly on the evidence of these ignorant witnesses and I do not think that this issue could be fairly tried on evidence taken on commission. As regards the removal of the books of the Company, whether the case is tried in Calcutta or at Karwar, there must be serious interference with the work of the Company. The extra inconvenience that will be caused by removing the books to a Court at a greater distance is not in my opinion sufficient to justify the transfer of the case.

I am, therefore, of opinion that a transfer of this case will neither promote the ends of justice, nor tend to the general convenience of parties or witnesses and I would accordingly discharge this Rule.

Mr. Eardley Norton (with him *Mr. Avetoom, Mr. K. N. Chaudhuri, Babu Atulya Charan Bose and Babu Manmatha Nath Mookerjee*), for the petitioner, contended that an order under section 185 of the Code of Criminal Procedure can be made on the ground of convenience, and submitted that *Rajani Benode Chakravarti v. All-India Banking and Insurance Company* (1) was wrongly decided by Imam and Chapman JJ. The High Court has undoubtedly the power to make an order in respect of an enquiry or trial in a Court outside its territorial limits. *Emperor v. Chaichal Singh* (2) is in my favour. It correctly lays down the law. Every accused person has a right to have his convenience consulted. There are two charges. As to the charge under section 420, the Bombay Court may have concurrent jurisdiction with this Court, but that cannot be said of the charge under

(1) (1913) I. L. R. 41 Cal. 395 ; (2) (1909) 9 Cr. L. J. 581.

17 C. W. N. 1207.

section 409. Moreover, the charges are vague and shadowy. We do not know who has been defrauded nor do we know what the fraud is? I do not base my argument only on the ground of convenience but also on the ground of expediency. It is desirable that the case should be tried here in Calcutta. The prosecution has been undertaken by the Crown, so the question of poverty does not arise. We are even willing to pay a reasonable amount for the conduct of the prosecution and the expenses of the witnesses. The prosecution propose to take away all our books. It will seriously and prejudicially affect the shareholders. We do not even object to the witnesses being examined on commission. Other considerations than mere technical considerations should weigh with the Judges.

Hiran Kumar Chowdhury v. Mangal Sen (1) lays down sound law.

This is a fit case for the exercise of this Court's powers under section 185: *Queen-Empress v. O'Brien* (2), *Emperor v. Mahadeo* (3), *Ganeshi Lal v. Nand Kishore* (4), *Re Rambilas* (5), *Krishnamachari v. Shaw, Wallace & Co.* (6).

The offg. Deputy Legal Remembrancer (Mr. Camell), for the Crown, submitted that s. 185 of the Criminal Procedure Code has no application in the circumstances of this case. The "doubt" contemplated by s. 185 is a doubt whether on the facts of the case the one Court or the other has jurisdiction to try the offence. If it appears on the facts that the one Court or the other has, or both Courts have, jurisdiction, s. 185 is not applicable. The charges against the accused are under ss. 420, 409 of the Penal Code, and are to be found in the Police charge-sheets read with the

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(1) (1912) 17 C. W. N. 761.

(4) (1912) I. L. R. 34 All. 487.

(2) (1896) I. L. R. 19 All. 111.

(5) (1914) I. L. R. 38 Mad. 639.

(3) (1910) I. L. R. 32 All. 397.

(6) (1915) I. L. R. 39 Mad. 576.

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explanation of the Magistrate and the note of the District Superintendent of Police. The charges may not be specific, but in this country charges are only definitely framed after evidence for the prosecution. There may be some doubt on the facts whether the charge under s. 409, is triable by the Bombay Court, but there can be no such doubt as to the charge under s. 420 of the Code. Prospectuses were issued and the alleged victims paid their money at Karwar. It is conceded by learned counsel for the petitioner that the charge under s. 420 is triable by the Bombay Court. I submit that this High Court has no jurisdiction under s. 185 of the Criminal Procedure Code to make any order in respect of the offence under s. 420 of the Penal Code. The main ground for the present reference to the Full Bench was, whether "convenience" is an element to be taken into consideration in applying s. 185. It is submitted that the decision in *Rajani Benode Chakravarti v. All-India Banking and Insurance Co.* (1) was correct and that the question of convenience is not to be considered in applying s. 185. The "doubt" in s. 185 refers to the question of "competence" of the Court and not to "convenience". It must be a doubt arising "under the preceding provisions of this chapter." Consider the scheme of Chapter XV:—S. 177 is the general provision, ss. 178—184 are in the nature of exceptions or special cases, all dealing with the question of competence. S. 185 contemplates a case of difficulty or doubt and indicates the High Court which is to determine which Court is to try the case.

It was argued that if the element of "convenience" were eliminated, s. 185 of the Criminal Procedure Code could have no application to s. 182, sub-cl. (2). The answer is if *ex hypothesi* an offence is committed partly

in one local area and partly in another, s. 185 will not apply. But a doubt may arise on the facts whether in fact the offence was so committed, and in case of such doubt s. 185 would become applicable. *Vide* cases cited by the petitioner.

In view of the phrase "under the preceding provisions of this chapter," it is important to note that none of the preceding provisions deal with the question of convenience. "Convenience" is provided for and dealt with in ss. 526, 527, of the Criminal Procedure Code and not in the present chapter. In this connection the course of legislation is instructive. S. 185 of the present Code reproduces s. 185 of the Code of 1882 (X of 1882) and corresponds with s. 69 of the Code of 1872 (X of 1872). Now in the Code of 1872 in the same Chapter which contains s. 69, we find s. 64 (corresponding with s. 526 of the Codes of 1882 and 1898) and s. 64A introduced by s. 11 Act XI of 1874 (corresponding with s. 527 of the Codes of 1882 and 1898). In the Code of 1882, ss. 526, 527 were relegated to a separate chapter (Chap. XLIV), and the words "under the preceding provisions of this chapter" were introduced into s. 185, of the Code. It is submitted the intention of the Legislature, was to exclude consideration of "convenience" in the application of s. 185. If "convenience" is to be considered in applying s. 185, s. 527 would become redundant and unnecessary. S. 185 and ss. 526, 527 are to be read as being mutually exclusive. The expression "should" in s. 185, is to be read not as opposed to "could," but as having the meaning of "shall"—this construction is supported by the use of the word "shall" in the marginal note to s. 185, Criminal Procedure Code.

If applicable, s. 185 of the Code empowers the Court only to make a declaratory order and not an order for transfer. On the merits this Rule should be dis-

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charged. Vagueness of the charges was not a ground on which the Rule was prayed for or obtained. The offence is sufficiently indicated for the commencement of criminal proceedings. If "convenience" is to be considered as an element, it is submitted s. 185 does not indicate that the convenience of the accused is to be primarily considered in determining the Court for trial. The removal of the books is a matter of consequence, but only books relating to the Kharwar agency would be required and books in current use could be returned, on extracts being taken. On the other hand it will be necessary to examine 30 or more poor illiterate witnesses residing at Kharwar to prove deception, payment of subscription, and how the policies came to lapse. It would be exceedingly difficult, if not impossible, to procure the attendance of these witnesses in Calcutta, and the effect of interference may well be to put an end to the proceedings. No weight should be allowed to the circumstance that the Registrar of Joint Stock Companies is enquiring into the affairs of this Company; he was obviously moved at the instance of the accused, the intention being to substitute in the place of the present criminal proceedings, an enquiry into the affairs of the Company.

Mr. Norton, in reply.

SANDERSON C. J. In this case a Rule was issued by this Court on the 14th August 1916, calling upon the District Magistrate of Karwar (in the Presidency of Bombay, District North Canara), to show cause why the proceedings should not be transferred to the Court of the Chief Presidency Magistrate in Calcutta, and the alleged offence enquired into and tried in Calcutta, or why such other order should not be passed in the matter as to this Court may seem fit and proper on the grounds mentioned in the petition, with a direction

that the Rule should be sent to the Registrar of the High Court in Bombay for favour of its transmission by him to the District Magistrate.

The Rule was served with the assistance of the Registrar of the Bombay High Court, upon the local Magistrate and the Rule came up for argument before Chaudhuri and Newbould JJ., during the vacation.

The questions at issue were (i) whether the learned Judges had jurisdiction under section 185 of the Code of Criminal Procedure to make the Rule absolute; (ii) if they had such jurisdiction, whether it should be exercised; and (iii) if it were so exercised, in what form the order should be made.

The learned Judges were agreed on the question of jurisdiction but were unable to agree as to the manner in which it should be exercised. They expressed the opinion that as the case involved an important question of jurisdiction, and as the Court in two reported decisions, viz., *Hiran Kumar Chowdhury v. Mangal Sen* (1) and *Rajani Benode Chakravarti v. All-India Banking and Insurance Company* (2) had apparently taken opposite views, they considered it a fit case for reference to a Full Bench, and expressed the view that as the matter was being referred to a Full Bench, that Bench should also consider the second question, viz., the question of convenience, upon which they were not agreed, a course in which the learned counsel engaged in the case before the Full Bench have concurred.

The questions for the determination of the Full Bench were stated as follows:—

“Is the decision in *Rajani Benode Chakravarti v. All-India Banking and Insurance Company* (2) correct?”

(1) (1912) 17 C. W. N. 761.

(2) (1913) I. L. R. 41 Calc. 305;
17 C. W. N. 1207.

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Is the form of the order in *Hiran Kumar Chowdhury v. Mangal Sen* (1) correct? If not, what is the correct form of the order?

The further point for consideration is :—

Has the accused made a sufficient case for an order under section 185 of the Criminal Procedure Code, on the ground of convenience?

The applicant for the Rule is the Managing Agent and a Director of the Bharat Luxmi Provident Company, Limited, carrying on business at its registered Head Office at 81, Clive Street, Calcutta, and he resides within the local limits of the Appellate Criminal Jurisdiction of this High Court.

Proceedings against him and one of the Company's agents were instituted at a place called Karwar in the Kanara District of the Presidency of Bombay.

The charges made against the applicant for the Rule are vague and indefinite.

Two charge-sheets have been produced before us written in the Kanarese language, and after considerable trouble, which would have been avoided if proper steps had been taken by those instructing learned counsel for the prosecution, the officials of the Court have succeeded in obtaining a translation.

These show the charges to be as follows :—

“(i) The charge is that the Company effected Life Assurance and granted Marriage Policies stipulating in both cases to pay more than the money invested by the assured, but has failed to do so. Accused stand charged under sections 420 and 409 of the Indian Penal Code.”

“(ii) Charged with swindling persons effecting insurances without proper return according to the regulations of the Company.”

Such statements do not give much, if any, indication of what the real nature of the criminal charges is against the Managing Agent, and, indeed taken by themselves, the statements might almost be said to amount to allegations of a civil liability against the Company rather than a criminal charge against the applicant personally. The District Superintendent of Police of Kanara, however, has forwarded a statement, entitled "Points to refute the statement made by Charu Chandra Majumdar in his application to the Calcutta High Court."

This statement is almost as vague as the statements in the charge-sheet, but it purports to allege that the Company on false representations and assurances led the public to become subscribers of the Company and to obtain policies, and failed to carry out the promises with the ultimate result that the policies lapsed and the Managing Agent managed the accounts in such a way by withholding proper receipts, that he appropriated the money subscribed by the Policy Holders and "allowed the policies to lapse directly or indirectly" and thereby managed to profit the Company and himself.

With such statements only before us, it is difficult to understand what is the real nature of the charge made against the Managing Agent; the conclusion I come to is, that the prosecution intend to allege some system of fraud against the Company to which the Managing Agent was a party and that they do not know what it will be until they have had an opportunity of investigating the books of the Company.

I am confirmed in this opinion by the fact that we were informed that the prosecution have demanded the production of the Company's books for the years 1911 to 1915, and that as regards the Managing Agent, the Magistrate has expressed the opinion "that the

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case against him seems to depend mostly on documentary evidence."

As regards the first point, viz., jurisdiction—it is not disputed by the learned counsel for the Crown that if it could be shown on the facts that the Court at Karwar had no jurisdiction to try the case against the Managing Agent, this Court would have jurisdiction under section 185 of the Code of Criminal Procedure, to decide by which Court the alleged offence should be inquired into or tried—and it has also been conceded by him that if on the facts there is a doubt where the offence was committed, this Court could exercise the powers given by section 185. He has argued, however, that on the facts the alleged offence under section 420 of the Penal Code, must have been committed (if committed at all), partly within the jurisdiction of the Karwar Court, and that as regards the alleged offence under section 409 of the Indian Penal Code, there may be a doubt whether the Karwar Court has jurisdiction.

He argued, therefore, that as regards the alleged offence under section 420, Indian Penal Code, at all events this Court could not exercise the powers contained in section 185.

In view of the conclusion at which I have arrived upon the question of "convenience," and to which I will refer hereinafter, I do not think it necessary to decide the point whether such a state of affairs as set out above would be sufficient to give the Court jurisdiction under section 185, and in my judgment it would not be desirable in this case to express any opinion thereon, unless it was necessary so to do, having regard to the vagueness and indefiniteness of the charges: the state of uncertainty in which the Court is left both as to the charges and the facts upon which they are alleged to be based make it very

difficult to arrive at any definite conclusion without further investigation.

The main point, however, on which the question of jurisdiction was argued, was that of "convenience."

It was argued on behalf of the applicant that this Court could exercise the powers given by section 185, merely on the ground of "convenience" and 'expediency.' This was strenuously denied in argument by the learned counsel for the prosecution. This question depends upon the proper construction of section 185.

That section says:—

"Whenever any doubt arises as to the Court by which any offence should under the preceding provisions of this Chapter be enquired into or tried, the High Court, within the local limits of whose appellate criminal jurisdiction the offender actually is, may decide by which Court the offence shall be enquired into or tried."

The words in the section "should under the preceding provisions of this chapter" necessitate a reference to sections 177 to 184, and a consideration of those sections leads me to the conclusion that in some cases mentioned in those sections, *e.g.*, where jurisdiction is given to more Courts than one for the same offence, if a doubt arises as to the Court by which such offence should be tried, it must involve a doubt as to the suitability of one Court as compared with another from the point of view of "convenience" and "expediency."

I therefore agree with the construction placed upon the section by Chaudhuri J. and Newbould J. This is in accordance with the judgment of Chitty J. and Richardson J. in *Hiran Kumar Chowdhury v. Mangal Sen* (1) and the *Emperor v. Chaichal Singh* (2).

(1) (1912) 17 C. W. N. 761.

(2) (1909) 9 Cr. L. J. 581.

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and consequently, in my judgment, the decision in *Rajani Benode Chakravarti v. All-India Banking and Insurance Company* (1) was not correct.

I take next the question whether from the point of view of general convenience the case against the Managing Agent should be tried in Calcutta or at Karwar. This is a question by no means free from difficulty as is evidenced by the fact that different views have been taken by Chaudhuri J. and Newbould J. I have come to the conclusion, however, that the balance of convenience is in favour of the case being tried in Calcutta and, therefore, with great deference to the opinion expressed by Newbould J., I really need say no more than that I agree with the conclusion arrived at by Chaudhuri J.

The learned Judge has set out the main grounds for his conclusion in his judgment, and I need not repeat them.

I will add this, that although it is alleged that a considerable number of witnesses who are policy-holders will be necessary to prove a "system" on the part of the Company, the evidence of such witnesses must necessarily be of a formal nature and perhaps undisputed, whereas the real crux of the case will depend upon a close investigation of the books of the Company, and upon an enquiry as to how the money subscribed by the Policy-holders has been applied. This will necessitate as we have been told and as I assume, the evidence of Expert Accountants on the one side and the other, and this is the part of the case which, in my judgment, will be likely to occupy the greater portion of the time devoted to the enquiry. The prosecution allege that the books for five years will be necessary and the Magistrate, as already

mentioned, states that the case will depend mostly on documentary evidence.

If such books and the Managing Agent are to be taken to Karwar and to remain there for weeks and perhaps months, it is possible that this may create a great hardship on the Company, and it is alleged that it will amount virtually to a stoppage of the business of the Company.

I think that this jurisdiction in cases of this kind should be exercised sparingly, but with respect to this matter, in my judgment, it is impossible to leave out of consideration the fact that the prosecution have failed to define the real nature of the criminal charges alleged against the Managing Agent, although it must have been obvious that on such an application as this, it was essential that the Court should have as definite information thereon as is possible—a fact which I think may be taken to render this case an exceptional one.

As regards the form of the order, in my judgment, it should follow the words of section 185 and it should be limited to a declaration that the Court's decision is that the case against Charu Chandra Majumdar should be inquired into or tried by the Court of the Chief Presidency Magistrate in Calcutta. This will leave it open to the prosecution or the applicant to take such steps as they may be advised.

I desire to take this opportunity of expressing our obligation to the Chief Justice and Judges of the Bombay High Court for their courteous assistance to us in this matter.

WOODROFFE J. The referring judgment holds that this Court has extra-territorial jurisdiction under section 185 and this is not disputed by the Crown and therefore I need not consider the action upon this point.

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The question then before us is whether the "doubt" referred to in the section is a doubt as to competency or jurisdiction, or whether it is a "doubt" whether one or another Court should enquire into or try a case on the ground that an accused alleges that it will be inconvenient for him if one of these Courts does so. There is no question but that this matter of convenience is dealt with by the Criminal Procedure Code, as regards Courts within the jurisdiction under section 526, and without the jurisdiction under section 527. We are then asked to say that though the Code provides that the Government may transfer a case which is in a Court outside the jurisdiction on the ground of convenience, section 185 gives a similar power to the High Court, with this difference that whereas the Government can make an order of transfer this Court cannot, but can only pass a "decision" in the nature of a declaratory order to which comity of Courts will give effect. It is not usual for the Legislature to duplicate procedure in this way and one result of holding that it has done so, will make it possible for this Court under section 185 and the Government under section 527 to pass conflicting orders. Further, as Mr. Camell has shown, the course of legislation is against the view that section 185 is intended to cover questions of convenience of this kind. For, under the Code of 1872, the present section 185* and sections 526, 527 were placed within the same chapter, whereas now the two latter sections have been removed to another chapter, and the words "under the preceding provisions of this chapter" have been inserted in section 185. Thus to take an instance appropriate to the present case under section 181 (2) criminal breach of trust may be tried by a Court within the local limits of whose jurisdiction any part of the property was received or

* See s 69 of Act X of 1872.

retained or the offence was committed. There might be a doubt on the facts whether what was done constituted a receiving or retention within a particular jurisdiction or whether the offence was committed in another local area. Under the circumstances the assistance of the Court might be invoked to determine the matter under section 185. But if there is no such doubt and it is clear that property was retained within one jurisdiction, and the offence committed in another, the Court has no power to interfere under section 185, on the ground that it is more convenient to the accused that he should be tried in one jurisdiction and not in another. To hold otherwise would be to cut down the clear provisions of section 181 (2) and to give the Courts of one province power to interfere with action taken in the Courts of another province, upon grounds which may occur in any and every case. This, I think, was never intended nor that the High Court should determine that one Court is more suitable than another if there is no doubt that there is jurisdiction in either. Section 185 is not designed to cut down admitted jurisdiction, but to determine cases where the facts said to constitute jurisdiction are doubtful. There must also be facts on which a doubt can arise. These provisions deal with jurisdiction and not with convenience. We may speak of a "doubt" whether one Court or another has jurisdiction, but it is straining language to say that there is a "doubt" (not a "question") whether it is convenient to an accused to be tried in one Court or another. The word "should" is possibly ambiguous and may apply to the suitability of a particular Court as well as its competency. For the reasons, however, above stated, I think that section 185 does not deal with transfer or decisions on the ground of mere convenience raised by the accused but with doubt as to competency. As the question of convenience can

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be raised in a very large number of cases, a contrary construction may lead to an obstruction of administration. Where proceedings are started in Bengal, applications can be made in Bombay, Madras, Allahabad, and elsewhere and *vice versâ*. There is nothing to prevent an accused leaving one jurisdiction and going to another to make such an application. If it is not a *bonâ fide* application it may be rejected, but meanwhile proceedings are delayed and the prosecution obstructed. I am of opinion we cannot under this section consider the question of convenience merely, but if we could, I agree with Mr. Justice Newbould that this is not a case in which we should make an order having the effect of removing the proceedings from Bombay. In a matter of convenience we must consider not only the interest of the accused but also of the prosecution and its witnesses. The return of the Magistrate states the grounds which I think support the view which Mr. Justice Newbould has taken. The complainants are poor illiterate persons and to ask them and their witnesses to travel, to Calcutta will, I have little doubt, result, as Mr. Camell says, in the prosecution falling through: though (without prejudging the case against the accused), there is material on the record to show that it is possible that this is one of the too numerous cases in which persons allege that they have been defrauded by the indigenous Provident Societies and Insurance Offices which have sprung up in India in recent years. If we accede to the general contentions urged in this case, the result is likely to be as follows:—Such societies generally have their head office in the larger towns and sometimes, as here, in the capital of another province than that in which the insurances are effected. In such cases to call upon poor illiterate persons to go to the expense and trouble of travelling far from

the place where the offence was committed may amount to a denial of justice. As is well known, the Courts are as a rule averse to issuing commissions in criminal cases and the main point urged by the accused that his books are wanted is met in part by the fact that they will be required wherever the suit is tried, and if it be said that the inconvenience will be less here than in Bombay, the answer is that all that the prosecution require are the entries relating to the Khanapur Agency and of these only copies are required, on which being given the books may be returned.

I come now to the next contention that apart from the question of convenience a "doubt" arises as to the competency of the Bombay High Court. It is conceded that no such doubt exists as regards the offence under section 420 which the Bombay Courts are empowered to try. It is said, however, and this is not denied, that there may be a doubt whether the Bombay Court has jurisdiction to try the offence charged under section 409. It is noteworthy that this point is not mentioned in the referring judgment. If we examine this point closely we find that what is meant to be said is not that there are allegations of fact on which a doubt arises which Court should try the offence, but that the facts alleged are insufficient to show what are the facts which are said to constitute the offence and where they were committed. If this be so, the obvious course is not to ask for an impossible decision whether the case should be tried here or in Bombay, but to take the necessary proceedings open to the accused in the Bombay Court. The nature of these proceedings would, according to Mr. Norton, be to quash the charge as regards section 409. His client does not propose to go to the Court which alone can do this, but he wishes to put section 185 to an indirect use and get the proceedings over

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here and then make an application which, if well founded, should be made now in the Bombay Court.

This is not such a "doubt" as is referred to in the section. How on these facts could we decide that the case under section 409, the facts of which we are ignorant, should be tried in Calcutta or anywhere else? Mr. Norton's real contention is that the case should not be tried anywhere upon the present charge at all.

If, however, we interpret the prosecution statements as definite enough to show that an offence may have been committed either in Bombay or at Calcutta, then we must first consider whether we can pass a decision which shall affect the proceedings under section 420 even though it is conceded no "doubt" arises with reference thereto. There is nothing in the section which authorises us to say that there is no doubt as to one offence but doubt as to another, and as the offences arise on the same facts give a decision which shall affect both charges. Nor, assuming we have such a power, is there any necessity to do so. The Bombay Court has clearly jurisdiction as regards section 420 of which it should not be deprived.

It is not clear when or on what materials an application under section 185 should be made, but it is to be noted that the want of definiteness is in part at least due to the fact that specific charges have not been formulated after evidence taken. This evidence may disclose either that the Court has jurisdiction to try an offence under section 409 or a charge of abetment of such offence. If so, there is no reason why the Court selected by the prosecution within whose jurisdiction the complainants are, should not try the offence. If the evidence discloses that no offence was committed within the jurisdiction, the accused will be acquitted on that ground. I am satisfied that there is

a great probability that as the result of holding otherwise the charges made will not be tried anywhere or at all. And this result and not a trial in any particular one of two Courts (as to which there may be a "doubt") is, doubtless, the object of the present application which seeks to put section 185 to an use for which, in my opinion, it was not intended.

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I would, accordingly, answer the questions referred to us as follows:—

- (i) Yes.
- (ii) The matter does not arise for decision on my judgment.
- (iii) Mere convenience either of the accused or prosecution is not a ground for action under section 185, and if it were, the proceedings in the present case should under the circumstances be left where they now are.

MOOKERJEE J. Two important questions of law arise on this reference, namely, *first*, is section 185 of the Criminal Procedure Code, restricted to cases instituted in a Court subordinate to the High Court to which the application is made? and, *secondly*, is section 185 restricted to cases where a doubt arises as to the jurisdiction of the trial Court by reason of some uncertainty regarding the facts or the law applicable to the case. If both these questions are answered in the negative, the point will require consideration, whether the circumstances of the case before us justify an order in favour of the accused, under the first subsection of section 185, which is in these terms: "Whenever any doubt arises as to the Court by which any offence *should, under the preceding provisions of this chapter*, be enquired into or tried, the High Court, within the local limits of whose Appellate Criminal Jurisdiction the offender actually is, may decide by which Court the offence shall be enquired into or tried."

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The first of the two questions formulated above relates to the jurisdiction of the High Court to make an order under this section in respect of an enquiry instituted or trial commenced in a Court situated beyond its territorial limits. Upon this matter, there is no divergence of judicial opinion. That the answer should be in the affirmative was assumed in the cases of *Hiran Kumar v. Mangal Sen* (1) and *Rajani Benode v. All-India Banking and Insurance Company* (2). The question, however, was expressly raised and decided in the affirmative in the case of *Emperor v. Chaichal Singh* (3). In the case before us, the point was not taken before the Division Court, and counsel for the Crown has not contended before us that if the case was otherwise within the scope of section 185, that provision was inapplicable by reason of the circumstance that the proceedings are pending in a Court subordinate to another High Court. This admission by counsel for the Crown would not, however, justify the assumption of jurisdiction by this Court, if section 185, upon its true construction, has no application to proceedings in what may be called extra-territorial courts; for it is an elementary rule, that jurisdiction cannot be conferred by consent of parties, where there is an entire absence of jurisdiction. We must further bear in mind that, on this reference, not merely the question whereupon there is divergence of judicial opinion, but the entire case, is under the Rules of Court before the Full Bench. It is for these reasons incumbent upon us to satisfy ourselves as to the applicability of section 185 to a proceeding instituted in a Court subordinate to another High Court, before we consider the case on the merits.

(1) (1912) 17 C. W. N. 761.

(3) (1909) 9 Cr. L. J. 581.

(2) (1913) 41 Cal. 305; 17 C. W. N. 1207.

Upon a careful examination of the provisions of section 185, I have arrived at the conclusion that the section is not restricted to proceedings instituted in a Court subordinate to the High Court where the application is made. The section invests that High Court with authority to determine the question, within the local limits of whose Appellate Criminal Jurisdiction the offender actually is. It is plain that such High Court may not be, in a particular case, the High Court superior to either of the Courts competent to try the offence, "under the preceding provisions of the chapter" mentioned. It is not necessary for my present purpose to determine whether the Legislature contemplated the commission of an offence under circumstances which make it triable in either of two Courts subordinate to two different High Courts. followed by an application under section 185 to a third High Court within the territorial limits of the appellate criminal jurisdiction whereof the offender ordinarily resides or is actually present at the time of the application. This, at any rate, is plain from the terms of the section that if the offence is triable by any one of two or more Courts subordinate to different High Courts, the High Court within the local limits of whose appellate criminal jurisdiction the offender actually is, is competent to entertain the application. I do not feel pressed by the fact that section 527 of the Criminal Procedure Code, authorises the Governor-General in Council to direct the transfer of any criminal case from any Criminal Court subordinate to one High Court to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court. The scopes of sections 185 and 527 are obviously different. Under the former section, the High Court, within the limits of whose appellate criminal jurisdiction the offender actually is, merely decides

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by which Court the offence shall be enquired into or tried. The order made is not in terms an order for transfer, though, no doubt, the resultant effect may be the same, as it is extremely improbable that one High Court should disregard such a determination by another High Court. Section 527, on the other hand, invests the Governor-General in Council with power to make an actual order for transfer. In my opinion, section 185 is comprehensive enough to be applicable to cases instituted in Courts beyond the local limits of the appellate criminal jurisdiction of the High Court where the offender actually is. The first question formulated above must consequently be answered in the negative.

The second of the two questions formulated at the outset, relates to the true scope of section 185, where it is applicable. Upon this matter, there is a divergence of judicial opinion in this Court, which has rendered necessary this reference to a Full Bench. In *Hiran Kumar v. Mangal Sen* (1), Chitty and Richardson JJ. adopted the view that where an offence is triable in either of two Courts, the High Court may make an order under section 185 on the ground that the offence may be enquired into or tried more conveniently in one of those Courts than in the other. On the other hand, in *Rajani Binode v. All-India Banking and Insurance Company* (2), Imam and Chapman JJ. put a restricted interpretation on the section and treated it as limited in application only to cases where a doubt arises as to the jurisdiction of the Court by which the offence may be enquired into or tried. Chaudhuri and Newbould JJ. have expressed themselves in favour of the more liberal construction of the section. Upon a minute

(1) (1912) 17 C. W. N. 761.

(2) (1913) I. L. R. 41 Calc. 305 ;
17 C. W. N. 1207.

scrutiny of the relevant provisions of Chapter XV of the Code of Criminal Procedure, I feel convinced that a narrow construction should not be placed upon section 185. This chapter comprises sections 177—199 and is divided into two parts, the first whereof is headed—"Place of enquiry or trial," and includes sections 177—189. Section 177 formulates the general principle that the ordinary place of enquiry and trial is the Court within the local limits of whose jurisdiction the offence is committed. Section 178 authorises the Local Government to order cases to be tried in different sessions divisions. Sections 179—184 embody provisions in the nature of exceptions or alternatives to section 177. Section 179 recognises the doctrine that the accused is triable either in the district where the criminal act is done or in the district where the consequence thereof ensues. Section 180 provides that where the act is offence by reason of relation to another offence, the trial may take place in either of the Courts competent to try the accused for either of the offences. Section 181 deals with four classes of cases. The first class refers to thugs and dacoits who are liable to be tried by a Court within the local limits of whose jurisdiction the person charged is. The second class includes criminal misappropriation and criminal breach of trust ; in the case of these offences, the offender can be tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person. The third class refers to stealing, and here the offender is made liable to be tried by a Court within the local limits of whose jurisdiction the property was stolen or was possessed by the thief or by a receiver of stolen property. The fourth class comprises kidnapping and abduction ; here the offence may be enquired into

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or tried by the Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained. Section 182, again, refers to four classes of cases; namely, *first*, where there is an uncertainty in respect of the local area where the offence is committed; *secondly*, where the offence has been committed partly in one local area and partly in another; *thirdly*, where the offence is continuously committed in more than one local area; and, *fourthly*, where the offence committed consists of acts done in different local areas; in each of these cases, the offence is made triable by a Court having jurisdiction over any of such local areas. Section 183 treats of an offence committed by a person in the course of performing a journey or voyage and makes the offender liable to be tried by a Court through the local limits of whose jurisdiction the offender or the person against whom or the thing in respect of which the offence has been committed passed in the course of the journey or voyage. Section 184 makes an offence against Railways, Telegraphs, Post Office, and Arms Act triable in a Presidency Town, where such offence may or may not have been committed, provided the offender and all the witnesses necessary for his prosecution are to be found within such town. The group of sections, just analysed, is followed by section 185 with which we are primarily concerned. That section relates to cases where any doubt arises as to the Court by which any offence *should*, "*under the preceding provisions of this chapter*," be enquired into or tried. Full effect must plainly be given to the expressions "*should*" and "*under the preceding provisions of this chapter*." The contention on behalf of the Crown is that the "*doubt*" mentioned is a doubt as to the jurisdiction of the Court by which the offence may be enquired into

or tried; but this narrow construction would clearly make section 185 inapplicable to all cases comprised in the previous sections, except the particular case contemplated in the first clause of section 182 which speaks of uncertainty with regard to the local area where an offence has been committed. In the events mentioned in the other sections, as also in the remaining clauses of section 182, no question can arise as to the competency of the particular Court to hold an enquiry or trial for the alleged offence. In very many instances, for example, in the classes of offences comprised in section 181 or section 184, the only possible question which can arise, on an application under section 185, is that of expediency or convenience; under the rules laid down, the enquiry or trial may be held in one of two or several Courts; the problem for solution is, where *should* the trial actually take place. Indeed, if all cases, where an order is sought under section 185 on the ground of convenience, were excluded from its scope, the reference therein to "the preceding provisions of the chapter" would become, in a very large measure, entirely nugatory. I am confirmed in my conclusion by the fact that the Legislature uses the term "*should*." I am not prepared to accede to the contention of the Counsel for the Crown that 'should' here is equivalent to 'could'. I do feel reluctant to impute to the Legislature ignorance of the meaning of this familiar word; on the other hand, I take 'should be tried', in its ordinary sense, as equivalent to 'ought to be tried'; for 'should' clearly implies a choice between two or more available alternatives. In fact, there would have been no room for controversy if the Legislature had used the term 'question' instead of the word 'doubt'. I am not impressed by the argument that if section 185 was intended to have

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such a wide scope as is contended on behalf of the accused, it would have been framed in the same terms as section 527, which authorises a transfer by the Governor-General in Council on the ground of convenience. The two sections have entirely different scopes. In the first place, the order under section 527 is an executive order which may be made without opportunity afforded to the accused to be heard. In the second place, section 527 contemplates an order for transfer, and recourse may possibly be had thereto if an order made by one High Court under Section 185 is disregarded by another High Court. I hold accordingly that the view taken in the cases of *Hiran Kumar v. Mangal Sen* (1), and *Emperor v. Chaichal Singh* (2), gave effect to the true intention of the Legislature, though in the former of these cases, the order was not made in strict conformity with the terms of section 185; and I am constrained to dissent from the decision in *Rajani Benode v. All-India Banking and Insurance Company* (3). The second question formulated by me must, like the first, be answered in the negative. In this view, it is unnecessary for me to consider, whether, even if the narrower construction were adopted, the present case would, in so far as the accused is charged with an offence under section 409 of the Indian Penal Code, fall within the purview of section 185, by reason of a conflict of judicial opinion regarding the true construction of section 179 and the consequent doubt as to the jurisdiction of the trial Court.

The question finally arises, whether, in the circumstances of the present case, an order under section 185 should be made in favour of the accused. Upon a full consideration of the facts which have been reviewed

(1) (1912) 17 C. W. N. 761.

(2) (1909) 9 Cr. L. J. 581.

(3) (1913) I. L. R. 41 Cal. 305; 17 C. W. N. 1207.

in detail by the learned Chief Justice in the judgment he has just delivered and which I cannot usefully supplement, I see no escape from the conclusion that the balance of convenience is on the whole in favour of a trial here. In my judgment, the Rule should be made absolute and an order made in terms of section 185.

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CHAUDHURI J. My answers are to be found in the order of reference. I have nothing to add to what I have said. The reasons why I think that the case should be tried in Calcutta are to be found in my separate judgment which is to be considered as part of my judgment in this reference.

NEWBOULD J. I wish to add some remarks to the joint judgment of reference to make my individual opinion more clear. Though I hold we have powers to pass orders under section 185 of the Criminal Procedure Code, on the application of the accused petitioner, I do not think it was intended that the section should be used for this purpose. It seems to me that the Legislature by giving jurisdiction to several Courts in the previous sections of Chapter XV intended, as far as possible, to remove doubts as to jurisdiction in cases in which such doubt might otherwise arise. There was no necessity to add section 185 to remove doubts as to jurisdiction. Even if doubts did arise as to the interpretation of these previous sections they could be dealt with in the same way as doubts as to jurisdiction which frequently occur in connection with other parts of the Code. But when more Courts than one had been given jurisdiction to try the same offence it became necessary to provide for a possible dead lock which would occur if two Courts either each refused to take action on the ground that the case should be tried by the other Court or both proceeded to try the

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same case. It seems to me clear this section was enacted to provide for such a difficulty and the doubt mentioned in the section is not a doubt as to jurisdiction but a doubt as to which Court having jurisdiction should try the case under such circumstances. On such a doubt arising the High Court exercising powers under section 185 would have to decide with reference to the convenience of all concerned. Though it was not intended that this section should enable an accused to apply for a transfer on the ground of his personal convenience the wording of the section is sufficiently wide to give a High Court power to take action on such an application. I entirely agree with the remarks of Mr. Justice Woodroffe as to the danger of an obstruction to administration that could be caused by an improper use of this section. To avoid this danger I think that these powers should seldom be exercised on the application of an accused and only if he be able to convince the Court that a refusal to exercise these powers is likely to lead to a miscarriage of justice. This, for reasons I have given in my previous judgment, I hold the present petitioner has failed to do.

I accordingly agree with my Lord the Chief Justice as to the answer to be given to the first two questions referred and adhere to my original opinion that the third question should be answered in the negative and the Rule discharged.

SANDERSON C.J. In consequence of the opinion of the majority, the Rule is made absolute and the order will be drawn up in terms of section 185 of the Criminal Procedure Code, as indicated in the judgment.

Rule absolute.

S. K. B.

APPELLATE CIVIL.

Before Mookerjee and Cuming JJ.

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June 27.

Decree—Court executing the decree cannot go behind the decree—Remedies of the aggrieved party—Practice.

The Court, executing the decree, must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree. The validity of a decree cannot be questioned in execution proceedings on the ground that as the lunatic plaintiff was not properly represented by a competent next friend in the suit, no decree for costs could have been made against him. A proceeding to enforce a judgment is collateral to the judgment, and, therefore, no enquiry into its regularity or validity can be permitted in such a proceeding. On this principle it can properly be held that a judgment against a person who was *non compos mentis* at the time of the trial and yet was not represented by a legal guardian, is not to be impeached in execution, but should be reversed or annulled in some direct proceeding taken for that purpose. Such a judgment can be attacked, for instance, by way of an application for review to the Court which made it, by way of an appeal or application for revision to a superior tribunal, or by way of a regular suit in a Court of competent jurisdiction, but the Court which made the decree cannot, when called upon to execute it, be invited to hold that the decree was erroneously or improperly made.

Rashid-un-nisa v. Muhammad (1) followed.

Papamma Rao v. Vira Pratapa (2), *Grish Chunder Lahiri v. Shoshi Shikhareswar* (3), *Hassan Ali v. Gauzi Ali* (4), *Rashbehari v. Joynanda* (5),

* Appeal from Original Order, No. 575 of 1915, against the decree of Amulya Charan Ghose, Subordinate Judge of 24-Perganas, dated Nov. 20, 1915.

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| (1) (1909) I. L. R. 31 All. 572 ;
L. R. 36 I. A. 168. | (3) (1900) I. L. R. 27 Calc. 951, 967 ;
L. R. 27 I. A. 110. |
| (2) (1896) I. L. R. 19 Mad. 249 ;
L. R. 23 I. A. 32. | (4) (1903) I. L. R. 31 Calc. 179.
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Shib Lakshan v. Tarangini (1), *Madan Mohan v. Bhikar Sahu* (2), *Ram Nath v. Basanta Narain* (3), *Ramphal Rai v. Ram Baran Rai* (4), *Muttia v. Virammal* (5), *Venkatachala Reddi v. Venkatarama Reddi* (6), *Appa Rao v. Krishna Ayyangar* (7), *Sheik Budan v. Ram Chandra* (8), *Prasanna Kumari Devi v. Sris Chandra* (9), *Chhoti Narain Singh v. Rameshwar* (10), *Khiarajmal v. Daim* (11), *Radha Prasad Singh v. Lal Sahab Rai* (12), *Janardhan v. Ram Chandra* (13), *Imdad Ali v. Jagan Lal* (14), *Subramania v. Vaithinatha* (15), *Gomatham v. Komanur* (16), *Amichand v. Collector of Sholapur* (17), *Geereeballa v. Chunder Kant* (18), *Devkabai v. Jefferson* (19), *Rama Prasad v. Anukul Chandra* (20), *Posumarti v. Ganti* (21), *Arjun Das v. Gunendra Nath* (22), *Chuck v. Cremer* (23), *Jaigobind v. Patesri Partap Narain Singh* (24) referred to.

THE facts, briefly stated, are these. A suit was instituted by one Mohamaya Dasi, as manager of her lunatic husband, Brojo Gopal Sircar, appointed under Act XXXV of 1858, for a declaration that certain documents executed by Brojo Gopal Sircar were void and not binding on him, inasmuch as Brojo Gopal was of unsound mind and was incapable of understanding those documents or of forming a rational judgment as to their effect upon his interests. The defendant objected to the suit on the ground that Mohamaya Dasi was a minor when she was appointed guardian. The Subordinate Judge enquired into the

(1) (1908) 8 C. L. J. 20.

(2) (1912) 16 C. L. J. 517.

(3) (1913) 18 C. L. J. 209.

(4) (1882) I. L. R. 5 All. 53.

(5) (1887) I. L. R. 10 Mad. 283.

(6) (1901) I. L. R. 24 Mad. 665.

(7) (1901) I. L. R. 25 Mad. 537.

(8) (1887) I. L. R. 11 Bom. 537.

(9) (1915) 22 C. L. J. 551.

(10) (1902) 6 C. W. N. 796.

(11) (1904) I. L. R. 32 Calc. 293 ;

L. R. 32 I. A. 23.

(12) (1890) I. L. R. 13 All. 53 ;

L. R. 17 I. A. 150.

(13) (1901) I. L. R. 26 Bom. 317.

(14) (1895) I. L. R. 17 All. 478.

(15) (1913) I. L. R. 38 Mad. 682.

(16) (1903) I. L. R. 27 Mad. 118.

(17) (1888) I. L. R. 13 Bom. 234.

(18) (1885) I. L. R. 11 Calc. 213.

(19) (1886) I. L. R. 10 Bom. 248.

(20) (1914) 20 C. L. J. 512.

(21) (1914) 28 Mad. L. J. 525.

(22) (1914) 20 C. L. J. 341.

(23) (1846) 2 Phil. 113, 115.

(24) (1906) 27 All. W. N. 286.

question of her age and found that she was not only a minor at the institution of the suit, but was even so at the time of the hearing of the suit. He therefore dismissed the suit and allowed costs to the extent of Rs. 400-8-9. On the 2nd of February the defendant applied for execution. Execution was sought against the infant son of Brojo Gopal Sircar, but he had died in the interval. Notice was served upon Mohamaya Dasi. On the 10th of July 1915 Mohamaya Dasi filed a petition of objection urging that the decree for costs was *illegal* and *ultra vires* since she herself was a minor, and as such was not competent to act as next friend of the lunatic. The Court disallowed her objections and directed execution to proceed against the assets of Brojo Gopal Sircar, the deceased judgment-debtor, in the hands of his minor son.

Against this order the aggrieved party appealed to the High Court.

Babu Bipin Behari Ghose, for the appellant, contended that the decree for costs was a nullity, having been passed against a minor who was not represented by a proper next friend. The decree therefore was illegal and *ultra vires* and could not be executed against the estate of the lunatic in the hands of his minor son. The appellant was not a party to the suit, and as such no decree for cost could be passed against her. I do not dispute the proposition that the executing Court cannot go behind the decree, but I dispute its application to the circumstances of this case. I submit that in the particular circumstances of this case the decree cannot be enforced and the application for execution should be dismissed.

Babu Biraj Mohan Mozumdar (with him *Babu Satindra Nath Mookerjee*), for the respondent. I

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submit that the executing Court cannot go behind the decree. The appellant has chosen a wrong remedy. This decree, so long as it is not vacated, is a good decree and should be enforced. This principle of law is well settled and is concluded by authorities. Rightly or wrongly the Court has passed this decree for costs. The appellant is not competent to question it in execution proceedings. She should either have filed a petition for revision or brought a declaratory suit to set the decree aside. The decree, as it stands, is valid and binding.

Cur. adv. vult.

MOOKERJEE AND CUMING JJ. This appeal is directed against an order for execution of a decree for costs. The decree was made on the 24th September 1913 and is in these terms: "It is ordered and decreed that this suit be dismissed and the costs of the suit, Rs. 400-8-9, be paid by the plaintiff to the abovenamed defendant with interest at 6 per cent. per annum from this day till date of realization." In the cause-title, set out at the commencement of the decree, the plaintiff is described as follows: "Lunatic Brojo Gopal Sircar, represented by certificated guardian under Act XXXV of 1858, Srimati Mohamaya Dasi, wife of the said Brojo Gopal Sircar." The decree consequently entitles the successful defendant to recover the costs allowed in his favour from the lunatic Brojo Gopal Sircar. On the 2nd February 1915 the defendant decree-holder applied for execution in accordance with Order XXI, rule 11 (2). Execution was sought against Kalipada Sircar, the infant son of Brojo Gopal Sircar, who had died in the interval. The Court accordingly directed notices to issue under Order XXI, rule 22 (1), clauses (a) and (b). The usual notice was also directed to

issue upon Mohamaya Dasi, who had been proposed by the decree-holder for appointment as guardian *ad litem* of the infant. On the 17th March 1915 the Court, with the consent of the proposed guardian, appointed her guardian *ad litem* of the infant. On the 21st April 1915 the Court issued a fresh notice under Order XXI, rule 22(1)(b), which was served in due course; on the 10th July 1915, the lady filed a petition of objection. She stated that she had lately attained majority and was not a fit and proper person to act as guardian *ad litem* of her infant son. On the merits, she urged that when the decree for costs was made in the original suit, she was herself a minor, not competent to act as next friend of the lunatic, and that the decree was consequently illegal and *ultra vires*, incapable of execution against the estate of her husband in the hands of his minor son. The court overruled these objections, and directed execution to proceed "against the assets of Brojo Gopal Sircar, the deceased judgment-debtor, in the hands of his minor son." The propriety of this order is the subject of controversy in the present appeal preferred on behalf of the infant by his mother.

The first objection taken in the Court below is entirely groundless. The lady consented to act as guardian *ad litem*; there is no reason why she should be discharged; there is no conflict of interest between her and her infant son in this matter. Indeed, this objection, though mentioned, has not been seriously pressed in this Court.

The second objection taken in the Court below raises a question of some nicety. The facts, essential for the full appreciation of the arguments addressed to us, may be briefly stated. The original suit was instituted on behalf of the lunatic by his wife, who had been appointed manager of his property when he

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was adjudged a lunatic on the 5th August 1911 under Act XXXV of 1858. The defendant pleaded that the suit was not maintainable, inasmuch as the manager was herself a minor and incompetent under the law to act as next friend of the lunatic. The Subordinate Judge took evidence upon the preliminary question, and came to the conclusion that Mohamaya Dasi was a minor, not only when she got herself appointed manager of the estate of her husband under Act XXXV of 1858, but also at the date of the institution of the suit, and had not attained majority even at the time of the trial. The Court held accordingly that she could not proceed with the suit on behalf of her husband and dismissed it with costs. The decree set out above was drawn up on the basis of this judgment. The question for determination is, whether the validity of the decree can be questioned in execution proceedings on the ground that as the lunatic plaintiff was not properly represented by a competent next friend in the suit, no operative decree for costs could have been made against him.

It is indisputable that the Court executing a decree must take the decree as it stands, and has no power to go behind the decree or to entertain an objection to the legality or correctness of the decree. This principle was recognised by the Judicial Committee in the cases of *Papamma v. Vira Pratapa* (1), and *Grish Chunder v. Shoshi Shikhareswar* (2), and has been applied in a long series of decisions: *Hassan Ali v. Gauzi Ali* (3), *Rashbehari v. Joynanda* (4), *Shib Lakshan v. Tarangini* (5), *Madan Mohan v.*

(1) (1896) I. L. R. 19 Mad. 249 ;

L. R. 23 I. A. 32.

(3) (1903) I. L. R. 31 Calc. 179.

(4) (1906) 4 C. L. J. 475.

(2) (1900) I. L. R. 27 Calc. 951, 967 ; (5) (1908) 8 C. L. J. 20.

L. R. 27 I. A. 110.

Bhikar (1), *Ram Nath v. Basanta Narain* (2), *Prasanna v. Sris Chandra* (3), *Ramphal v. Ram Baran* (4), *Muttia v. Virammal* (5), *Venkatachala v. Venkatarama* (6), *Appa v. Krishna* (7), *Budan v. Ram Chandra* (8), *Jaigobind v. Patesri* (9), *Chhoti v. Rameshwar* (10); some of them were reviewed by this Court in *Ramaprasad v. Anukul Chandra* (11). The doctrine itself is not disputed before us, but its applicability to the circumstances of this case is denied by the appellant. The argument in substance is that the lunatic was not at all represented before the Court at the trial of the suit, and the Court was consequently not competent to pass a decree to his detriment. This position is supported by a reference to three decisions of the Judicial Committee, *Khiaraj-mal v. Daim* (12), *Rashid-un-nisa v. Muhammad* (13), *Radha Prasad v. Lal Sahab* (14), which show that a Court is not competent to make an operative decree against a person not a party to the suit or properly represented on the record; but still the question remains whether an objection on the ground can be raised in proceedings in execution of such a decree. We are of opinion that the answer should be in the negative. The point is really concluded by the decision of the Judicial Committee in *Rashid-un-nisa v. Muhammad* (13). There the plaintiff sued for a declaration that two decrees and three sales in execution of decrees were invalid so far as concerned her

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(1) (1912) 16 C. L. J. 517.

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(2) (1913) 18 C. L. J. 209.

(11) (1914) 20 C. L. J. 512.

(3) (1915) 22 C. L. J. 551.

(12) (1904) I. L. R. 32 Calc. 296 ;

(4) (1882) I. L. R. 5 All. 53.

L. R. 32 I. A. 23.

(5) (1887) I. L. R. 10 Mad. 283.

(13) (1909) I. L. R. 31 All. 572 ;

(6) (1901) I. L. R. 24 Mad. 665.

L. R. 36 I. A. 168.

(7) (1901) I. L. R. 25 Mad. 537.

(14) (1890) I. L. R. 13 All. 53 ;

(8) (1887) I. L. R. 11 Bom. 537.

L. R. 17 I. A. 150.

(9) (1906) 27 All. W. N. 797.

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share in her paternal estate, which purported to be bound thereby. The two decrees were alleged to be not binding upon her, because, amongst other reasons, her sister, a married woman, had, in the suits in which these decrees were made, been improperly appointed her guardian *ad litem*. The defendants asserted the validity of the decrees and sales in execution, and pleaded, *inter alia*, that the suit was barred by the provisions of section 244 of the Code of Civil Procedure of 1882. The Subordinate Judge held that the suit was not barred and decreed it on the merits. The High Court (Stanley C. J. and Burkitt J.) held on appeal that the suit was barred under section 244. They observed that the decrees, whereon the execution proceedings were founded, were not and could not be impeached in the suit; the impeached transactions were proceedings in execution of those decrees, and the proper course for the plaintiff was to raise these objections under section 244 and not by a separate suit, as the question "arose between the parties to the suit in which the decree was passed or their representatives and related to the execution of the decree." The Judicial Committee, on appeal, reversed the decision of the High Court, and restored that of the primary Court. Sir Andrew Scoble, who delivered the judgment of their Lordships, observed: "Section 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term. Her sister was a married woman, and therefore was disqualified under section 457 of the Code from being appointed guardian for the suit." That a question

of this character cannot be determined in execution, follows from two other decisions of the Judicial Committee [*Radha Prasad v. Lal Shab* (1), *Khیارajma v. Daim* (2)], where relief was granted in regular suits on the ground that the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. Lord Watson observed in the first case that an operative decree, obtained after the death of a defendant, by which the extent and quality of his liability are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced. Lord Davey observed in the second case that as against persons who were not parties to the proceedings or properly represented on the record, the decrees and sales purporting to be made, would be a nullity, and might be disregarded without any proceeding to set them aside. These two cases were argued by counsel, who had an intimate knowledge of Indian Codes, before eminent Judges, who possessed an extensive acquaintance with our system of procedure (Sir Barnes Peacock, Sir Richard Couch and Sir Arthur Wilson). If the contention of the appellant is well founded, it is singular that it did not strike anybody that the suits were barred under section 244, as the question in controversy could and should have been raised in execution proceedings. It is worthy of note that in *Pasumarti v. Ganti* (3), when an objection of this character was raised in execution proceedings, the application was converted into a plaint under the provisions of section 47 (2) of the Civil Procedure Code, and this course was approved by the High

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(1) (1890) I. L. R. 13 All. 53; (2) (1904) I. L. R. 32 Calc. 296, 313, 315;
L. R. 17 I. A. 150. L. R. 32 I. A. 23.

(3) (1914) 28 Mad. L. J. 525.

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Court. Our attention, however, has been drawn to the decision in *Subramania v. Vaithinatha* (1), where objection was allowed to be taken in execution proceedings that the decree under execution was passed after the death of the defendant and before his legal representatives were impleaded. Reliance was placed upon the decisions in *Janardhan v. Ram Chandra* (2), *Radha Prasad v. Lal Sahab* (3), and *Imdad Ali v. Jagan Lal* (4). In the first case, objection was taken not in execution of the decree, but by way of application to the Court which had passed it. In the second case, the objection was taken not in execution, but by way of a regular suit. In the third case, the objection was sustained, though taken in execution; but this view is clearly opposed to the decision of the Judicial Committee in *Rashid-un-nisa v. Muhammad* (5). On the other hand, we find that in *Gomatham v. Komandur* (6), under somewhat similar circumstances, the judgment-debtor was not allowed to object to the validity of the decree in the course of its execution. The position is obviously different where, as in *Arjun Das v. Gunendra Nath* (7), objection is taken to the execution proceedings on the ground of the death of the judgment-debtor, not before but after decree. We also find that in *Ami Chand v. Collector of Sholapur* (8), the question was raised by way of application to the High Court to set aside a decree, so improperly made, in the exercise of its extraordinary jurisdiction. The substance of the matter is that a proceeding to enforce a judgment is collateral to the judgment, and therefore no enquiry into its regularity or validity can be

(1) (1913) I. L. R. 38 Mad. 628.

(2) (1901) I. L. R. 26 Bom. 317.

(3) (1890) I. L. R. 13 All. 35 ;

L. R. 17 I. A. 150.

(4) (1895) I. L. R. 17 All. 478.

(5) (1909) I. L. R. 31 All 572 ;

L. R. 36 I. A. 165.

(6) (1903) I. L. R. 27 Mad. 118.

(7) (1914) 20 C. L. J. 341.

(8) (1888) I. L. R. 13 Bom. 234.

permitted in such a proceeding. On this principle, it can properly be held that a judgment against a person who was *non compos mentis* at the time of the trial, and yet was not represented by a legal guardian, is not to be impeached in execution, but should be reversed or annulled in some direct proceeding taken for that purpose. Such a judgment can be attacked, for instance, by way of an application for review to the Court which made it, by way of an appeal or application for revision to a superior tribunal, or by way of a regular suit in a Court of competent jurisdiction; but the Court which made the decree cannot, when called upon to execute it, be invited to hold that the decree was erroneously or improperly made. The case before us is covered completely by the decision of the Judicial Committee in *Rashid-un-nisa v. Muhammad* (1). Here the lunatic was never a party to the suit in the proper sense of the term; his wife, though appointed the manager of his estate under Act XXXV of 1858, was herself a minor, and was thus disqualified to act as his next friend in the suit. The lunatic was, in the words of Sir Andrew Scoble, never a party to the suit in the proper sense of the term, and consequently the question now raised is not a question which arises between the parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. The appellant has contended that this view is likely to lead to lamentable results; that if the decree is allowed to be executed, the purchaser will acquire no title, and that much mischievous litigation will, as a consequence, follow. We appreciate the force of this contention; at the same time, there is no answer to the argument of the respondent that if the decree is

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(1) (1909) I. L. R. 31 All. 572; L. R. 36 I. A. 168.

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directly challenged, as it should be, in an appropriate proceeding, the Court will no doubt remodel the decree in accordance with Order XXXII, rule 2, read with rule 15 [*Geereeballa v. Chunder Kant* (1), *Devkabai v. Jefferson* (2)] and thus safeguard his just rights, while if the objection to execution prevails, he will be left without a remedy. We are of opinion that the safest course to follow is to adhere rigidly to the established principle that every order and judgment, however erroneous, is, in the words of Lord Cottenham in *Chuck v. Cremer* (3), good until discharged or declared inoperative, and that the execution Court cannot enquire into the validity or propriety of the decree. This, no doubt, assumes that there is a valid decree in existence, that is, an adjudication by a Court of Justice, a decree or order which has not ceased to be operative and is, capable of execution.

The result is, that the order of the Subordinate Judge is affirmed and this appeal dismissed with costs.

S. K. B.

Appeal dismissed.

(1) (1885) I. L. R. 11 Cal. 213. (2) (1886) I. L. R. 10 Bom. 248.

(3) (1846) 2 Phil. 113, 115.

CIVIL REFERENCE.

Before Mookerjee and Cuming JJ.

1916

*In the matter of RASIK LAL NAG.**

July 4.

Professional Misconduct—Legal Practitioners Act (XVIII of 1879 as amended by Act XI of 1896), ss. 13, 14—Scope of s. 14—Contempt of Court—"Court," meaning of.

Section 14 of the Legal Practitioners Act is not limited in its application to cases covered by clauses (a) and (b) only, but covers cases of misconduct under all the clauses of section 13.

Misconduct in the presence of the Court which shows disrespect of its authority and which obstructs and has a tendency to interfere with the due administration of justice is contempt. The principle is not limited to misconduct in the actual presence of the Judge; the Court is deemed to be present in every part of the place set apart for its use and for the use of its officers, jurors, and witnesses and therefore misbehaviour in such places is misconduct in the presence of the Court.

In the matter of Purna Chunder Pal(1), *In the matter of Southekal Krishna Rao*(2), *Le Mesurier v. Wajid Hossain*(3), *In the matter of Muhammad Abdul Hai*(4), *In the matter of the Second-grade Pleaders*(5), *In the matter of Gholab Khan*(6), *In the matter of Bajrangi Sahai*(7), *In the matter of Kali Prasanna Chowdhury*(8), *In the matter of Radha Charan Chacravarti*(9), *In the matter of an Advocate, a Vakil, a Pleader, and a Mukhtear*(10), *The District Judge of Krishna v. Hanumanulu*(11), *In the matter of Ganavathi Sastri*(12), *French v. French*(13), *Rex v.*

* Civil Reference, No. 11 of 1916, under section 14 of the Legal Practitioners Act, dated Feb. 20, 1916, by Kumud Nath Ray, Munsif of Kushtea, through J. C. H. MacNair, District Judge of Nadia.

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|-------------------------------------|--------------------------------|
| (1) (1899) I. L. R. 27 Calc. 1023. | (7) (1911) 15 C. W. N. 269. |
| (2) (1887) I. L. R. 15 Calc. 152. | (8) (1910) 11 C. L. J. 164. |
| (3) (1902) I. L. R. 29 Calc. 890. | (9) (1906) 4 C. L. J. 229. |
| (4) (1906) I. L. R. 29 All. 61. | (10) (1901) 4 C. L. J. 262. |
| (5) (1901) I. L. R. 34 Mad. 29, 34. | (11) (1915) Mad. W. R. 1050. |
| (6) (1871) 7 B. L. R. 179. | (12) (1909) 19 Mad. L. J. 504. |
| (13) (1824) 1 Hogan 138. | |

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Carroll (1), *Roach v. Hall* (2), *Ex parte Burrows* (3), *Ex parte Jones* (4), *In Re Johnson* (5), *Ex parte Wilton* (6), *Kirby v. Webb* (7), *Charlton's Case* (8), *Helmores v. Smith* (9) referred to.

THIS was a report made under section 14 of the Legal Practitioners Act by the Munsif of Kushtea through the District Judge of Nadia for disciplinary action against Rasik Lal Nag, a mukhtear, practising in his Court. The District Judge has endorsed the views of the Munsif. The facts are shortly these. On the 7th of January 1916 while the accountant was busy with his work in his office room, the mukhtear went into the room with a lapsed payment order, caused serious interruption to the accountant's work and said that he would swear an affidavit to the effect that the accountant had asked for bribe from him. The accountant, thereupon, told him to hold his tongue and not interfere with his work. This greatly displeased the mukhtear who raised a hue and cry and filthily abused the accountant. On the intervention of the officers, the mukhtear left the office abusing the accountant. The occurrence took place in the room next to the Munsif's court-room who heard the abusive language addressed to the accountant. Upon the complaint of the accountant, the Munsif drew up proceedings under section 14 of the Legal Practitioners Act against the mukhtear and, after an elaborate enquiry, submitted his report under section 14 of the Legal Practitioners Act to this Court through the District Judge of Nadia. The District Judge supported the views of the Munsif.

Babu Debendra Nath Bagchi, Babu Baranasibasi

(1) (1744) 1 Wilson 75.

(5) (1887) 20 Q. B. D. 68.

(2) (1742) 2 Atk. 469.

(6) (1842) 1 Dowling N. S. 805.

(3) (1803) 8 Ves. 535.

(7) (1887) 3 T. L. R. 763.

(4) (1806) 12 Ves. 237.

(8) (1836) 2 My. & Cr. 316.

(9) (1886) 35 Ch. 449, 455.

Mukerjee and *Babu Mohini Mohan Chatterjee*, appeared against the reference.

The Senior Government Pleader (Babu Ram Charan Mitra), in support of the reference.

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Cur. adv. vult.

MOOKERJEE AND CUMING JJ. This is a report, made under section 14 of the Legal Practitioners Act, by the Munsif of Kushtea, through the District Judge of Nadia. The Munsif has recommended disciplinary action against Rasik Lal Nag, a mukhtear practising in his Court, and the District Judge has in his opinion endorsed the views of the Munsif. The circumstances which led the Munsif to take action under section 14 may be briefly stated.

On the 7th January 1916, Kisoril Lal Chatterjee, Accountant in the office of the Munsif of Kushtea, reported that while he was busy with his work in his office room, the mukhtear, Rasik Lal Nag, interrupted him, seriously threatened him, and, when asked to keep quiet, vilely abused him. The Munsif, who held his Court in an adjoining room, had himself heard the altercation. He, accordingly, issued a notice on the mukhtear under section 14, which set out the substance of the charge and called upon him to show cause why disciplinary action should not be taken against him for grossly improper conduct towards an officer of the Court. The mukhtear entered appearance and contested the allegations of the accountant. The result was an elaborate enquiry by the Munsif, which led him to the conclusion that the conduct of the mukhtear had been highly improper and merited severe condemnation. It appears that the mukhtear, along with two other persons, was a litigant in a case in that very Court. A sum of Rs. 15-4 deposited in the Sub-Treasury at Kushtea was jointly

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payable to them. The payment order form was passed by the accountant on the 22nd December 1915, and under the rules of Court, was to remain in force for a period of 10 days. The pleader employed by the parties did not, however, withdraw the money within the prescribed time. The result was that when, on the 7th January 1916, the mukhtear, accompanied by his pleader and clerk, went to receive payment, they were informed that the payment order had lapsed, and that it would be necessary to apply for its renewal. This appears to have annoyed the mukhtear, and an altercation ensued between him and the accountant. The evidence recorded in these proceedings shows that the mukhtear abused the accountant, and the latter, not unnaturally, retaliated. It is extremely difficult, if not practically impossible, to allocate the blame precisely between the two contestants; but the Munsif, whose opinion is accepted by the District Judge, holds that the mukhtear was the aggressor. It is plain, however, that the accountant had not much of a reputation for civility of manners, and, on one occasion, had struck a blow to the clerk of a pleader, which incident had not been forgotten. His attitude towards the mukhtear, so far as one can gather from the evidence, was, in view of his antecedents, not very re-assuring. The parties on this occasion did not, however, actually come to blows; there was abundance of mutual abuse and re-crimination, and when the sheristadar threatened to call in the office peon to put the mukhtear out, the latter, in the words of the Munsif, "marched out of his own accord." In these circumstances, the Munsif, as also the District Judge, recommended that "punishment of an exemplary character would be very salutary and very well deserved."

On behalf of the mukhtear, a preliminary objection has been taken to the validity of the reference on the

ground that the Munsif was not competent to take action under section 14 as the latter section is limited in its application to cases covered by section 13, clauses (a) and (b). In support of this view, reference has been made to the dictum of Hill, J. in the case of *In re Purna Chunder Pal* (1). In that case, Hill, J. relied upon the judgment of Lord Hannen in *In the matter of Southekal Krishna Rao* (2), where section 14 was read by the Judicial Committee along with section 13, and it was ruled that the expression "charged with any such misconduct" in section 14 referred back to the preceding section and was consequently limited to "misconduct in the discharge of professional duty." Hill, J., however, overlooked that section 13 had been amended after the decision of the Judicial Committee, and, that, whereas in 1883 (the date of the order under review by the Judicial Committee) section 13 comprised a paragraph which corresponds to what is now included in clauses (a) and (b), before 1899 (the date of the order under review by Hill, J.) that is, by section 2 of Act XI of 1896, a new and extended section 13, which comprises clauses (c), (d) and (e) not included in the original section 13, had been introduced by the Legislature into the Legal Practitioners Act, in supersession of the section in its primary form. Consequently, the question now before us, namely, whether the expression "such misconduct as aforesaid" in section 14 is restricted to fraudulent or grossly improper conduct in the discharge of his professional duty, or is comprehensive enough to cover all cases of misconduct whether they be included in clause (b) or in one or more of the other clauses (c), (d), (e) and (f), never arose before the Judicial Committee. On the other hand, the judgment of the Full

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(1) (1899) I. L. R. 27 Calc. 1023. (2) (1887) I. L. R. 15 Calc. 152 ;
L. R. 14 I. A. 154.

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Bench in *Le Mesurier v. Wajid Hossain* (1) shows that conduct comprised in the clauses other than clauses (a) and (b) may also be properly described as misconduct; indeed it was suggested by Rampini and Gupta, JJ. in the order of reference that the expression "any other reasonable cause" in section 13 (f) may be paraphrased as "any kind of misconduct other than the professional misconduct specified in the preceding clauses." We are of opinion that the question cannot be treated as concluded either by the observation of Lord Hannen in *In the matter of Southekal Krishna Rao* (2) or by the dictum of Hill, J. in *In the matter of Purna Chunder Pal* (3). We also find that the dictum of Hill, J. has been doubted in *In the matter of Kali Prasanna Chowdhury* (4) and *In the matter of The Second-grade Pleaders* (5). We further find that Sir George Knox, J., dissented from the view of Hill, J., in the case of *In re Muhammad Abdul Hai* (6) and held that the words "any such misconduct as aforesaid" as used in section 14, relate to all the cases set out in section 13, in other words, a subordinate Court is competent to enquire into a matter falling within the purview of any of the clauses of section 13, when the pleader or Muktear whose conduct is called in question practises in such Court. This view is not opposed to the decision in *In re Radha Charan Chacravarti* (7) where, although the dictum of Hill, J. was quoted, the only question for determination was the competency of the subordinate Court to investigate a charge of misconduct committed in another subordinate Court, specially during the pendency of proceedings under section 14 in the latter

(1) (1902) I. L. R. 29 Cal. 890.

(4) (1910) 11 C. L. J. 164.

(2) (1887) I. L. R. 15 Cal. 152.

(5) (1910) I. L. R. 34 Mad. 29, 34

(3) (1899) I. L. R. 27 Cal. 1023.

(6) (1906) I. L. R. 29 All. 61.

(7) (1906) 4 C. L. J. 229.

Court; a careful scrutiny of the judgment shows that it does not deal with the question in controversy before us, nor can the decision in *In the matter of Gholab Khan* (1), which turned upon the construction of sections 15 and 16 of Act XX of 1865, be treated as binding authority on the question of the true scope of sections 13 and 14 of Act XVIII of 1879 as amended by Act XI of 1896. That question was recently considered by a Full Bench of the Madras High Court in the case of *District Judge of Kristna v. Hanumanulu* (2), and the construction was adopted that section 14 covers all the clauses of section 13, so that a subordinate Court is competent to take proceedings against a legal practitioner for misconduct alleged to come within clause (f) of section 13. We agree with Sir John Wallis, C. J. that there is no good reason why charges under clauses other than clauses (a) and (b) of section 13, should not be investigated in the first instance by the subordinate Court, and it would be very inconvenient if they could not. The introduction of clauses (c), (d) and (e) into section 13, without any amendment of section 14, goes rather to show, as observed by Ghose, J. in *In the matter of Purna Chunder Pal* (3), that section 14, as it stood, was deemed wide enough to cover them. The Court would be slow to presume that the Legislature had overlooked the point and had through oversight left a lacuna which must lead to serious practical inconvenience. If the narrow construction indicated by Hill J. be adopted, the result follows that while in cases of misconduct comprised in clauses (a) and (b) of section 13, the subordinate Court may forthwith institute an enquiry under section 14, and may, if necessary, exercise the power of suspension at

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(1) (1871) 7 B. L. R. 179.

(2) (1915) Mad. W. R. 1050.

(3) (1899) I. L. R. 27 Calc. 1023, 1028.

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the appropriate stage [*In the matter of Bajrangi Sahai* (1)], the subordinate Court may be helpless in cases of a much graver character, for instance, where a practitioner is guilty of extremely contumacious conduct in Court. Sections 13 and 14 were intended, in our opinion, to cover the same ground in so far as the character of the misconduct is concerned. If the misconduct is brought or comes to the notice of the High Court without the intervention of the subordinate Court, the High Court is competent to take direct action under section 13: if section 14 had stood by itself, the result would have been that the High Court would be powerless to take disciplinary action, where the Subordinate Court had, by reason of weakness, ignorance, or like cause, failed to take notice of the misconduct and to report the matter to the High Court under section 14. A good illustration is afforded by the decision of the Full Bench in *In the matter of an Advocate, a Vakil, a Pleader, and a Mukhtear* (2) where the misconduct committed in the Court below and ignored by that Court, was noticed by this Court in the course of the hearing of an appeal from original order. Section 14, on the other hand, invests the subordinate Court with authority to institute an enquiry, if, in its opinion, such misconduct has been committed as deserves investigation by that Court. From this point of view, the two sections supplement each other, but the cardinal fact remains that whether the enquiry is made by or under the orders of the High Court under section 13 or is instituted by the subordinate Court of its own motion, the final order can be passed only by the High Court. In fact, sections 12 to 15 show that the final determination in all these cases rests with the

(1) (1911) 15 C. W. N. 269.

(2) (1901) 4 C. L. J. 262.

High Court and the High Court alone. We hold accordingly that the decisions in *In the matter of Muhammad Abdul Hai* (1) and *District Judge of Kristna v. Hanumanulu* (2) take a correct view of the intention of the Legislature and that section 14 covers cases of misconduct under all the clauses of section 13. In this view, the objection that the Munsif had no jurisdiction to take proceedings against the practitioner in respect of misconduct alleged to come within clause (f) of section 13 must be overruled. We desire to add, however, that even if we had felt constrained to adopt the restricted view taken by Hill, J., the mukhtear would not have been benefited in the least degree. It cannot be disputed that this Court is competent to take action under section 13, clause (f), after such enquiry as it thinks fit. The section does not require that the enquiry should be conducted directly by the High Court; the enquiry may well be made by a subordinate Court under the direction of the High Court. The only essential is, as pointed out by the Full Bench in *In the matter of Ganapathi Sastri* (3), that notice must be given to the legal practitioner concerned to show cause against suspension or dismissal, and the notice must formulate the charges; with great particularity and precision, so as to enable the practitioner to know the charges he is called upon to meet. That condition has been amply fulfilled in this case. There is, thus, no reason, why the enquiry by the Munsif, though not conducted under the orders of this Court, should not be adopted for the purpose of a proceeding under section 13, if we took the view that this Court could proceed only under section 13 and not on a report by

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(1) (1906) I. L. R. 29 All. 61.

(2) (1915) Mad. W. N. 1050 ;

(3) (1909) 19 Mad. L. J. 504.

18 Mad. L. T. 549.

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the subordinate Court under section 14. We must consequently examine the case on the merits.

The misconduct imputed to the Muktear technically amounted to a contempt of Court. It is well settled that misconduct in the presence of the Court which shows disrespect of its authority or which obstructs or has a tendency to interfere with the due administration of justice, is contempt; on this ground, disorderly conduct in the Court room is treated as contempt of Court. This principle is not limited to misconduct in the actual presence of the Judge; the Court is deemed present in every part of the place set apart for its use and for the use of its officers, jurors and witnesses, and, therefore, misbehaviour in such places is misconduct in the presence of the Court. Sir William MacMahon M. R., in *French v. French* (1), observed that as a tribunal administering laws, without authority to protect its proceedings from outrage or disturbance, presents to the mind the idea of an institution which must be impotent, dependent and frequently useless, the Court will exercise its jurisdiction for outrages committed or insults offered in the face of the Court; he then added that the same jurisdiction will be extended to all the departments and offices of the Court, a proposition which results directly from the cases mentioned: *King v. Carroll* (2), *Roach v. Hall* (3), *Ex parte Burrows* (4), *Ex parte Jones* (5). The same principle was recognised in the decision *In Re Johnson* (6), *Ex parte Wilton* (7), *Kirby v. Webb* (8), *Charlton's Case* (9). A similar doctrine has been adopted and repeatedly applied in cases of

(1) (1824) 1 Hogan 138.

(5) (1806) 13 Ves. 237.

(2) (1744) 1 Wilson 75.

(6) (1887) 20 Q. B. D. 68.

(3) (1742) 2 Atk. 469.

(7) (1842) 1 Dowl. N. S. 805.

(4) (1803) 8 Ves. 535.

(8) (1887) 3 T. L. R. 763.

(9) (1836) 2 My. & Cr. 316.

high authority in the Courts of the United States: *Fisher v. MacDaniel* (1), *U. S. v. Carter* (2), *U. S. v. Emerson* (3), *State v. Woodfin* (4). No useful purpose would be served by a minute comparison of the facts of the different cases; what we are concerned with is the ascertainment of the general principle, and that principle is accurately formulated in the language used by Harlan, J. in delivering the unanimous opinion of the Supreme Court in *Ex parte Sarin* (5). "The Court, at least when in session, is present in every part of the place set apart for its own use and for the use of its officers, jurors and witnesses, and misbehaviour any where in such place is misbehaviour in the presence of the Court." In the case before us, there is no room for doubt that the practitioner misbehaved in the presence of the Court within the meaning of this rule; in fact, the abusive language used by him was heard by the presiding Judge himself, who was holding his Court in the room adjoining the office where the incident took place. In these circumstances, it is incontrovertible that this Court may take disciplinary action against the mukhtear. No doubt, the power of suspension or removal is distinct from the power to punish for contempt [*Ex parte Robinson* (6)]; but a contempt may be of such a character as to warrant the exercise of the disciplinary powers of the Court. At the same time, we must not overlook that, as pointed out by Bowen, L. J., in *Helmore v. Smith* (7), when the Court takes notice of a misconduct which consists in

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(1) (1901) 9 Wyo. 457;
 87 Am. St. Rep. 971.

(2) (1829) 3 Cranch C. C. 423;
 25 Fed. Cas. 313.

(3) (1831) 4 Cranch C. C. 188;
 25 Fed. Cas. 1012.

(4) (1844) 5 Ired. (N. C.) 199;
 42 Am. Dec. 161.

(5) (1884) 131 U. S. 267.

(6) (1873) 19 Wallace 505.

(7) (1886) 35 Ch. D. 449, 455.

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the obstruction of or an interference with one of its officers, the object of the discipline enforced is not so much to vindicate the dignity of the Court or the person of the officer, as to prevent undue interference with the administration of justice: from this point of view, the present case is not of much gravity; there was obviously no intentional disrespect towards the Court; the mukhtear was rather moved by a sudden impulse. In view of these extenuating circumstances and also of his long standing and position in the profession, we are of opinion that it will be sufficient to warn him as a mark of our disapproval of his conduct. We direct accordingly that he be warned.

S. K. B.

CRIMINAL REVISION.

Before Sanderson C.J. and Walmsley J.

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Aug. 3.

BROWN

v.

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Sanction for Prosecution—False information to the police followed by a complaint to the Magistrate on the same facts and the same charge—Complaint investigated by the Magistrate—Necessity of sanction to prosecute informant only in respect of the false charge to the police—Criminal Procedure Code (Act V of 1898) s. 195 (1) (b).

Where an information to the police is followed by a complaint to the Court, based on the same allegations and the same charge, and such complaint has been investigated by the Court, the sanction or complaint of the Court itself is necessary even for a prosecution of the informant, under s. 211 of the Penal Code, in respect of the false charge made to the police.

* Criminal Revision, No. 607 of 1916, against the order of K. N. Chaudhuri, Honorary Magistrate of Sealdah, dated April 1, 1916.

Tayebullah v. King-Emperor (1) approved.

Putiram Ruidas v. Mahomed Kasem (2) discussed.

Jadu Nandan Singh v. Emperor (3) distinguished.

Emperor v. Hardcar Pal (4) referred to.

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THE petitioner, F. A. Brown, was a shareholder of the Strand Bank Jute Press Co., owning 600 shares, and the former managing agent and secretary of the Press. On the 25th February 1915 he laid an information, at the Chitpore police-station, charging Ananda Lal Mullick, the present managing director, with theft of certain articles from the Press, and one H. G. Keymer, the engineer of the Press, with abetment thereof. The police sub-inspector held an investigation but refused to take action, considering the matter to be of a civil nature. The petitioner thereupon lodged a complaint, to the Police Magistrate of Sealdah, based on the same facts as were stated in the information to the police, on the 1st March 1915, against Ananda Lal and Keymer, under ss. 380 and ⁴⁸⁰/₁₀₉ of the Penal Code, respectively. The case was made over for trial to Rai B. N. Bose Bahadur, Honorary Magistrate, who, after examining the petitioner on oath, issued processes against the two accused. On the 10th March, Ananda Lal and Keymer filed separate complaints before the Sealdah Police Magistrate against the petitioner, under s. 211 of the Penal Code, in respect of the alleged false charge at the Chitpore thana. The Magistrate ordered the complaints to be put up pending the disposal of the case instituted by the petitioner. Subsequently, the Honorary Magistrate having retired, the petitioner's complaint was withdrawn to his own file by the Police Magistrate who, after examining a number of witnesses, dis-

(1) (1916) 24 C. L. J. 134 ;
I. L. R. 43 Calc. 1152.

(2) (1895) 3 C. W. N. 33.

(3) (1909) I. L. R. 37 Calc. 250.

(4) (1912) I. L. R. 34 All. 522

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charged the accused Ananda Lal and Keymer, on the 23rd December 1915, on the ground that, assuming the petitioner's complaint to be true, a case did not lie against the managing director at the instance of one shareholder only. The complaints of Ananda Lal and Keymer against the petitioner were then taken up and referred, on the 11th March 1916, to Mr. K. N. Chaudhuri, Honorary Magistrate. The latter issued a summons against the petitioner under s. 211 of the Penal Code. After certain intermediate proceedings the petitioner obtained the present Rule from the High Court to quash the proceedings pending at the instance of Ananda Lal.

Babu Atulya Charan Bose and *Babu Jagat Chandra Bose*, for the petitioners.

Mr. Gregory and *Babu Manmatha Nath Mukerji*, for the opposite party.

Cur. adv. vult.

SANDERSON C.J. In this case the petitioner, Mr. Brown, on the 25th of February 1915, laid an information at the Chitpore police station, charging one A. L. Mullick, who was the managing director of the Company in which Mr. Brown was a shareholder, with the theft of certain steel joists and other articles belonging to the Company. The engineer of the Company was charged with aiding and abetting the alleged offence.

The sub-inspector after investigating the matter refused to take action upon the information.

Thereupon, the petitioner, on the 1st of March 1915, lodged a complaint before the Sub-divisional Officer of Sealdah, and the charge which was alleged in that complaint was under section 380 of the Indian Penal Code against A. L. Mullick, namely, theft, and against the engineer for aiding and abetting that offence.

This was sent by the Sub-divisional Officer to the Honorary Magistrate at Sealdah for disposal.

Before the Honorary Magistrate the petitioner was examined on oath, and then process was issued by the Magistrate against A. L. Mullick, charging him with an offence under section 380, and the engineer with an offence under section 380 read with section 109 of the Indian Penal Code.

It should be noted that this was a charge to the same effect as that made by the petitioner to the Police.

Then the Honorary Magistrate retired and the result was that the Sub-divisional Magistrate put the case on his own file.

On the 10th of March 1915, the engineer laid a complaint charging the petitioner, Mr. Brown, under section 211 of the Indian Penal Code, that is to say, with making a false charge against him knowing that there was no just or lawful ground for such charge, and with intent to cause injury to the complainant. With regard to that matter, on the 23rd of March 1915, the Sub-divisional Officer, according to the note on the order sheet said, "I have seen the police papers. They do not justify any step being taken in this case. There is a cross case in the file of Rai B. N. Bose Bahadur. Put up after the disposal of that case." A similar application was made by A. L. Mullick and a similar order, as I understand, was passed.

Then the case which was instituted by Mr. Brown, the petitioner, was enquired into, fifteen witnesses were examined for the prosecution, and after numerous adjournments, on the 23rd of December 1915, the Sub-divisional Officer discharged the accused A. L. Mullick and the engineer basing his judgment upon this: He said, "the question is, can a case like this lie against the managing director at the instance of only one

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shareholder who holds only 600 shares out of 2,500 shares A member of a Company cannot maintain an action in which he sues on behalf of himself and all other members of the company in respect of wrongs committed against or frauds upon the company, as the wrongful or fraudulent acts can be confirmed by the majority of the corporation In the present case also nothing has been done to ascertain the views of the other shareholders and taking it for granted that the prosecution story is true, it is not known what view the majority of the shareholders in a meeting of the company will take in the matter, and, as such, no case can lie." The correctness of this judgment has not been argued and is not under discussion, but it is to be noted that the Sub-Divisional officer did not decide that the prosecution had been brought without *bona fides*.

On the 11th of March 1916 two cases were brought: the first by A. L. Mullick; and, the second by the engineer against the petitioner Mr. Brown; and they were made over to the Honorary Magistrate. And after several adjournments and orders with reference to the two cases, a Rule was obtained in this Court on the 19th of June 1916 to show cause why the proceedings against the petitioner Brown, which were pending at the instance of A. L. Mullick, should not be quashed.

The charge made by A. L. Mullick in his complaint was that the petitioner Mr. Brown had brought a false charge of theft against him at the Chitpur thana, knowing that he had no justification for it, and that such charge was brought maliciously to do harm to A. L. Mullick: and, this charge was based upon section 211 of the Indian Penal Code.

The main point upon which the Rule was obtained

was that the offence charged was in relation to a proceeding in the Court and that no sanction of that Court had been obtained; and consequently under section 195, (1) (b) of the Criminal Procedure Code that Court could not take cognizance of the alleged offence.

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Learned counsel for A. L. Mullick showed cause and argued that, inasmuch as the alleged false charge which was complained of was made in the Chitpur thana and not in Court, no sanction was necessary.

The learned vakil for the petitioner replied that when an information is followed by a complaint to the Court, sanction is necessary under section 195.

Apart from any authorities I should have no doubt as to the construction of the statute, and that under the circumstances of this case where the information to the police was followed by a complaint to the Court based on the same allegations and on the same charge as that contained in the information to the police, and when the complaint has been investigated by the Court, sanction, or a complaint of the Court itself under section 195 (1) (b) of the Criminal Procedure Code would be necessary, before the Court could take cognizance of an offence punishable under section 211 of the Indian Penal Code, alleged to have been committed by making a false charge to the police on the ground that it was an offence committed in relation to a proceeding in Court. If A. L. Mullick had based his charge on section 182 of the Indian Penal Code, which he might have done, the sanction of the police officer to whom the alleged false charge was made, or the sanction of some public servant to whom he was subordinate would have been necessary. If he had based his case on the allegations made by the petitioner in the Court, clearly the sanction of the Court would be necessary before he could take

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proceedings against the petitioner under section 211. But it is alleged that A. L. Mullick can base his charge upon section 211, confining it to the allegations of the petitioner in the police office and proceed without the Court's sanction, although there was no material difference between the information to the police and the allegations presented in the Court. I do not think this was the intention of the Legislature. To hold otherwise, might lead to unreasonable results, *e. g.*, assume a case where the information to the police is followed up by a complaint of a similar nature and to the same effect in Court, which after investigation by a Magistrate is discharged: the person who had been accused then applies to the Court for sanction to prosecute the person who laid the complaint for making a false charge in Court, the Court refuses such sanction. According to Mr. Gregory's argument the person who had been accused can then proceed without any sanction against the prosecutor alleging that he made a false charge to the police in the thana relying on the same allegations and the same facts, which the Magistrate has already investigated and as to which he had refused his sanction. Such a construction would be most unreasonable and, in my judgment, is not warranted by the language of the statute.

With regard to the cases which were quoted to us, the first was *Putiram Ruidas v. Mahomed Kasem* (1). It is to be noted that in that case the Rule was granted in the following terms:—"Let a Rule issue to the Magistrate to show cause why the sanction for prosecution granted by the Honorary Magistrate should not be revoked upon the ground that such sanction could only have been given by the Court to which the original complaint had been made." The Rule was discharged upon that ground. But the Court went on

to deal with the further question and laid it down in these terms: "It appears, however, that sanction has really been granted by the Honorary Magistrate to prosecute the petitioner for bringing a false charge against Mahomed Kasem and others before the Belliaghata police, but that was not an offence committed in or in relation to any proceeding in his Court, and therefore it seems to us that no sanction from the Honorary Magistrate was necessary, and upon that ground we think we ought to set it aside." In my judgment, that decision was an *obiter dictum*—it was not necessary for the decision. The learned Judges had already discharged the Rule upon another ground, and, having regard to what appears at the end of the judgment I do not quite follow the reasoning of the learned Judges, because they say as follows—"Observing at the same time that we see no reason why the prosecution should not proceed without any sanction whatever, the offence having been committed in the laying of a criminal charge before the police, that charge having now been enquired into judicially and the enquiring Magistrate being of opinion that it is a fit case for the prosecution of the petitioner." If they thought that no sanction of the Magistrate was necessary, then I fail to understand why it was necessary for them to draw attention to the fact that the enquiring Magistrate was of opinion that it was a fit case for the prosecution of the petitioner. I do not myself feel bound by the decision of that case, as I have said the opinion of the learned Judges was *obiter dictum*.

The other case cited by Mr. Gregory was the case of *Jadu Nandan Singh v. Emperor* (1). There the question was as to the proper construction of section 476 of the Criminal Procedure Code, as to which

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different considerations arise, having regard to the language which is used in section 476, different to that of the section which is now under consideration. The *ratio decidendi* is made quite clear by the learned Judges at page 254 where they say; "Let us now turn to section 476. That section—we quote only so much of it as applies to the present case—provides, that, when any Criminal Court is of opinion that there is ground for enquiring into any offence referred to in section 195 and committed before it, or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary enquiry that may be necessary, may send the case for enquiry or trial to the nearest Magistrate of the first class." The construction of the section which is now being considered only came into consideration incidentally in that case, and, in my judgment, the point which is now under consideration does not seem to have been present to the learned Judges' mind, and I do not think, having regard to the terms of the judgment, that they ever intended that decision to cover the point in the present case.

A case was cited by the learned vakil for the petition, viz., *Emperor v. Hardwar Pal* (1). It is not necessary for me to express any opinion as to whether that judgment is correct, because the judgment in that case goes a great deal further than the judgment that we are giving in this case, inasmuch as the facts are quite different from the facts in this case, they were to this effect that the person who was alleging that a false charge was made against him in the police-station was not before the Magistrate, although others who were implicated in the same charge were. The head note is this. "He made a report against several persons, including one S., at a police station, charging

them with rioting and voluntarily causing hurt. The police made inquiry and sent up several persons, for trial, but not S. Some of these were convicted by the Magistrate, but acquitted by the Sessions Judge. Thereupon S. made a complaint to the Magistrate, charging H. with having made a false report in respect of himself to the police. The Magistrate took cognizance of the complaint. *Held*, that the Magistrate had no power to take cognizance of the complaint by reason of the absence of sanction." As I have said before, it is not necessary for my judgment to express any opinion as to whether we are prepared to go so far as the decision in the case in the Allahabad Series, because the facts in the present case are different from the facts in that case : and, in my opinion, the present question is much easier for decision than the one presented in the other case. There is one passage in the judgment to which I wish to refer, which I think helps this case, and it is this (at page 527): "It is obvious that there is considerable relation between the first report and the proceeding in Court, for the latter is the result of the former. The report led to the police inquiry and the latter to the proceeding in Court. The offence if it be one under section 211 committed in respect to Sher Bahadur Singh was committed in relation to the proceeding in Court, and at least the sanction of the Court would be necessary under section 195(1) (b)." As I have said before, I guard myself by saying that I am not now expressing an opinion whether the case is right or wrong. If it is right, then the reasoning applies *a fortiori* to this case which is now before us, and confirms the opinion at which I have already arrived upon the construction of the words of the statute.

I am confirmed in the judgment which I have arrived at by a decision of Mr. Justice Mookerjee and

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Mr. Justice Sheepshanks in the case of *Tayebullah v. King Emperor* (1), and it must be remembered that Mr. Justice Mookerjee was a party to the decision in the case of *Jadu Nandan Singh v. Emperor* (2). The head note of that case (1) is this. "No sanction to prosecute is necessary under section 195 (1) (b) of the Code of Criminal Procedure when a false charge has been made to the police and has not been followed by a judicial investigation thereof by a Court. Where, therefore, the complainant to the police never applied to the Magistrate for investigation, nor did he impugn the correctness of the police report as to the falsity of the complaint, nor did he pray that the person accused by him might be brought to trial, nor was he examined on oath by the Magistrate. *Held*, that the order for sanction to prosecute him was bad, if it was deemed to have been granted under section 195 of the Code, inasmuch as there was no 'complaint.' within the meaning of section 4 (h) of the Code, and the offence could not be said to have been committed in a proceeding in a Court." The passage in the judgment to which I wish to refer is this: "No sanction was required in this case under section 195 (1) (b). A sanction is requisite in respect of an offence under section 211 of the Indian Penal Code only when such offence has been committed in or in relation to any proceeding in any Court; no sanction is necessary when a false charge has been made to the police and has not been followed by a judicial investigation thereof by a Court The position is different where, upon the police report as to the falsity of the complainant, the complainant insists upon a judicial investigation; if he does so, he is deemed to have preferred a complaint to the Magistrate; if the Magistrate

(1) (1916) 24 C. L. J. 134; (2) (1909) I. L. R. 37 Cal. 250.

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finds his case to be false, a sanction would be requisite under section 195, (1) (b), as the offence may be said to have been committed in a proceeding in a Court." It is satisfactory to us that we had arrived at the above-mentioned decision before we knew of the conclusion to which Mr. Justice Mookerjee and Mr. Justice Sheepshanks came the other day, and to find that their judgment is in conformity with ours.

For these reasons, I think that the Rule must be made absolute and the proceedings against the petitioner must be quashed.

WALMSLEY J. I agree in the judgment that has been delivered by the learned Chief Justice.

E. H. M.

Rule absolute.

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[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL:]

Attachment—Alienation by judgment-debtor alleged to be pending the attachment and a fraudulent transfer to a creditor other than decree-holder—Transfer of Property Act (IV of 1882), s. 53—Judgment-debtor preferring one creditor before others—Civil Procedure Code, 1882, ss. 240, 276, 295—Contest between private alienor and decree-holder—Continuance of attachment.

The question in this case was which of two titles to the property in suit was to be preferred, that of the appellant under two deeds of sale executed in her favour on 15th July 1907 by the judgment-debtor, or that of the respondent (decree-holder) who purchased the property at an auction sale on 23rd of August 1907 in execution proceedings under a decree, dated 3rd January 1901, which were instituted by an application for attachment on 16th July 1907. There were two decrees of the High Court at Calcutta, Original Side, against the judgment-debtor, of 24th August 1896, and 3rd January 1901, and the respondent was transferee of both decrees, which were sent to the District Court at Murshidabad for execution. On 13th June 1902, application was made for execution of the decree of 1896, and the proceedings became execution case 8 of 1902 ; and the execution of the decree of 1901 commenced as above as execution case 16 of 1907.

Held by the Judicial Committee (reversing the decision of the High Court), that on the evidence and under the circumstances of the case the appellant (plaintiff) had the better title. The deeds in her favour were not antedated as alleged, and there was no fraudulent transfer to her within the meaning of section 53 of the Transfer of Property Act (IV of 1882). The preferring of one creditor to another by the judgment-debtor did not make the transfer a fraudulent one. A debtor, for all that is contained in section 53 may pay his debts in any order he pleases, and may prefer any creditor he chooses.

**Present* : LORD PARKER OF WADDINGTON, LORD SUMNER, SIR JOHN EDGE.
AND SIR LAWRENCE JENKINS.

Nor was the private alienation to the appellant void under section 276 of the Civil Procedure Code, 1882, as having been made during the continuance of an attachment. The respondent's title rested entirely on the attachment in the execution case 16 of 1907, and that alone was the attachment the continuance of which could avoid the appellant's private alienation; but on the facts it did not do so. The respondent could not invoke the attachment in execution case 8 of 1902 to defeat the alienation to the appellant which was made in different execution proceedings. Nor could he with its aid rely on section 295 of the Civil Procedure Code, 1882, as entitling him to the benefit of section 276. There were no assets in Court which was essential if section 295 were invoked, and the only attachment within the meaning of section 276 was that in execution case 16 of 1907 which he could not employ against the appellant.

Sorabji Edulji Warden v. Gobind Ramji (1) referred to.

APPEAL 27 of 1915 from a judgment and decree (26th March 1912) of the High Court at Calcutta which reversed a judgment and decree (29th March 1909) of the Subordinate Judge of Murshidabad.

The plaintiff was the appellant to His Majesty in Council.

The principal questions for decision in this appeal were whether the properties in suit were, on 16th July 1907, owned by one Chhatrapat Singh, or by the appellant, Mina Kumari Bibi, in whose favour Chhatrapat Singh is alleged to have executed two conveyances of those properties on 15th July 1907; and whether an auction sale at which the respondent Bijoy Singh Dudhuria purchased the properties is liable to be set aside.

The facts giving rise to the suit from which this appeal arose were that Chhatrapat was indebted to the appellant in a sum of about Rs. 7,000 of which she was demanding early payment, and it was agreed between them that Chhatrapat should transfer to the appellant certain properties valued at Rs. 6,500 which should be

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accepted by the appellant in full satisfaction of the debt. In pursuance of that agreement Chhatrapat, on 15th July 1907, executed the two conveyances above-mentioned, one of certain zamindari properties valued at Rs. 5,000 and the other of certain buildings valued at Rs. 1,500, both the deeds being duly registered on 16th September 1907.

The respondent Bijoy Singh Dudhuria was also a creditor of Chhatrapat Singh and the assignee of a decree against him in the High Court at Calcutta dated 3rd January 1901; and on 16th July 1907, he applied to the Court of the District Judge of Murshidabad for attachment and sale under that decree of (amongst others) the properties so conveyed by Chhatrapat to the appellant. All the properties were accordingly attached and ordered to be sold, and the appellant then put in a claim to those which had been conveyed to her, and applied to the Court that they should not be sold until her claim had been disposed of in the execution proceedings; but her application was refused and the properties were all sold under the attachment.

The present suit was thereupon instituted against the respondents (who had purchased the properties at the sale) and against Chhatrapat Singh, for a declaration that at the date of the sale the properties she claimed belonged to her and not to the respondent Bijoy Singh Dudhuria, and for possession, an injunction and other reliefs.

The respondents denied that Chhatrapat was ever indebted to the appellant, and pleaded that the conveyances to her were not *bonâ fide*, but were without consideration, fraudulent and collusive.

The material issues were whether the transfer to the plaintiff was made for consideration, and was a *bonâ fide* transaction, and did it in any way affect the plaintiff's title, and whether the transfer was made

during the subsistence of an attachment, and for the purpose of defrauding the creditors?

The Subordinate Judge was of opinion that the amount stated in the conveyances to be due to the appellant was then due to her from Chhatrapat Singh, the judgment-debtor, that there was good consideration for the deeds of transfer, and that a fair value was given for the properties sold; and he accordingly held that the respondents acquired no title by their purchase at the auction sale. He further held that it was not proved that at the date of the transfer the properties were under attachment; and made a decree in favour of the appellant.

The respondents appealed to the High Court, and it was admitted at the hearing of the appeal that the finding of the Subordinate Judge was right as to the indebtedness of Chhatrapat to the appellant. But it was contended that the conveyances were antedated, and were in fact not executed until after the application for execution on 16th July 1907; and that in any event the sale to the appellant was not *bona fide* but was made solely with a view to defeat the other creditors of Chhatrapat Singh.

The High Court (CHITTY AND TEUNON JJ.) held that the circumstances showed that the conveyances had been antedated, and that the whole transaction was fraudulent. The grounds for coming to that conclusion were, that the properties were stated in the conveyances to be sufficient to satisfy Rs. 6,500, whereas they fetched Rs. 13,925 at the auction-sale; that two conveyances were executed when one would have been natural and sufficient; that there were suspicious circumstances about the stamps, and the dates of their purchase; that the stamp-vendor was not called for the appellant; that on 29th July Chhatrapat filed an objection to the execution but in it made no

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mention of the conveyances; and that there was undue delay in presenting the conveyances for registration, and the departure of Chhatrapat for Calcutta (which was the reason alleged for the delay) would not have prevented their being presented for registration at once. The High Court consequently allowed the appeal and dismissed the suit with costs.

On this appeal,

Upjohn, K.C., and *Sir William Garth*, for the appellant, contended on the facts that the sale to the appellant was a *bonâ fide* transaction, and the deeds were not fraudulent and collusive as held by the High Court, and were made prior to the attachment. The grounds relied upon by the High Court were on matters not raised during the hearing of the evidence in the first Court, and should not have been raised in the High Court.

De Gruyther, K. C., and *B. Dube*, for the respondent, contended that the attachment in the execution case 8 of 1902 was subsisting at the date of the sale to the appellant, and the transfer to her was therefore, under section 276 of the Civil Procedure Code, 1882, void against all claims "enforceable under that attachment." Though purporting to have been executed at a date prior to the attachment, the deeds of transfer were, it was submitted, really antedated in order to make that appear to be the case. The respondent was entitled to the benefit of section 295 of the Civil Procedure Code, 1882, as his claim under the decree of 1896 was enforceable against the proceeds of the sale; and if so, the transfers to the appellant were void under section 276. This view of the construction of those sections has been embodied in section 64 of the Code of 1908. Reference was made to *Sor bji Edulji Warden v. Govind Ramji* (1). Here the respondent had applied

for a rateable distribution under section 295, and though it was not relied upon in the High Court, the point was taken in the grounds of appeal to that Court, and in the respondent's case in this appeal, and, it was submitted, was available to the respondent in argument here: see *Beni Pershad Koeri v. Dudh Nath Roy* (1).

Upjohn, K. C., in reply. The respondent purchased at an auction sale held in the execution case of 1907, and not under the execution proceedings of 1902; and the attachment in 1907 was admittedly subsequent to the sale to the appellant. The attachment referred to in section 276 of the Code of 1882 is that in the execution case in which the order for the attachment was made and not an attachment made in any other execution proceedings. The attachment in 1907 was not in operation, and section 295 was therefore not applicable. The execution proceedings including the attachment had been abandoned before 1907.

The judgment of their Lordships was delivered by

SIR LAWRENCE JENKINS. This is a suit for the possession of immoveable property brought by a purchaser under a private alienation against a purchaser at an execution sale, who was also the decree-holder, and against the judgment-debtor. There was also originally another defendant, but he has since died and is now represented by the decree-holder.

The suit was decided in the plaintiff's favour in the Court of the Subordinate Judge at Berhampur, but on appeal it was dismissed with costs by the High Court of Calcutta. From the High Court's decree the present appeal has been preferred to His Majesty in Council.

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The judgment-debtor is Chhatrapat Singh Dugar who is not inexperienced in litigation. Two decrees were passed against him in the High Court of Calcutta on its Original Side, one on the 24th August, 1896, in suit 449 of 1896, the other on the 3rd January, 1901, in suit No. 302 of 1900. The defendant, Raja Bijoy Singh Dudhuria, the purchaser at the execution sale, was a transferee of both decrees, and so became the decree-holder under each.

It will be convenient to trace briefly the history of these decrees, both of which were sent for execution to the Court of the District Judge of Murshidabad.

On the 13th June, 1902, an application was made at Murshidabad by the decree-holder, for execution of the decree of 1896, and the proceedings became execution case No. 8 of 1902.

On the 12th July, 1902, an order of attachment was made under section 274 of the Civil Procedure Code, 1882, prohibiting the judgment-debtor from alienating the property there specified until any other order should be passed by that Court.

The proceedings were protracted by adverse claims, but ultimately on the 29th March, 1905, the following order was recorded: "Nothing further can be done in this case at present. The application for execution is accordingly dismissed with the consent of the decree-holder. Certify result to the High Court, Original Side."

Though this does not appear on the record, it may be assumed that the Murshidabad Court certified the result to the High Court, in accordance with the provisions of the Code (section 223).

On the 26th July, 1907, another application, No. 19 of 1907, was made to the Murshidabad Court for execution of the decree of 1896, and here, too, it may be assumed that an order was made by the High Court

for the transmission of the decree. The order made on the application was, "Now issue warrant of attachment. Returnable on 16th August."

On the 29th July, 1907, at the decree-holder's instance, the issue of the warrant of attachment was stayed, and a direction given for the issue of notice to the judgment-debtor to show cause, on the 16th August, why the properties should not be advertised for sale.

On the 16th August, the decree-holder applied for the issue of a sale proclamation, "the attachment being taken to have subsisted since the order passed on the 29th March, 1905, on his previous application for sale of the same properties. . . . Previous to that order there had been an order passed on the 20th March, 1905, directing that the 'sale of the [other] property now for sale here is postponed indefinitely.'"

Notwithstanding Chhatrapat's opposition, the District Judge held that the application 19 of 1907 must be received as one in continuation of the former proceedings, that the properties were still under attachment, and that a sale proclamation might issue without the property again being attached. Though on the face of things it seemed no real concern of his, still Chhatrapat appealed, but the order was affirmed by the High Court. So much, then, for the proceedings under the decree of 1896.

Under the other decree, that of 1901, an application for execution, No. 16 of 1907, was made by the decree-holder on the 16th July, 1907, in the Murshidabad Court. Notice was issued, and on the 29th July, 1907, an order was made for the issue of a warrant of attachment. On the 23rd August, 1907, attachment was effected. A claim was preferred by the present plaintiff, but the property was sold in execution, notwith-

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standing her opposition, the purchaser being the decree-holder, in whose favour an order had been made allowing the purchase money to be set off against the decretal amount, which was considerably in excess of the price.

The private alienation under which the plaintiff derives title was effected by two sale deeds expressed to be executed in her favour on the 15th July, 1907, by the judgment-debtor. The question in this litigation is which of the two titles is to be preferred, the plaintiff's or the decree-holder's.

The plaintiff alleges that hers is the earlier, and that the judgment-debtor had no right, title, or interest in the property in suit at the date of the attachment in execution case No. 16 of 1907, under which the decree-holder bought. The plaintiff also questions, with certain exceptions, the identity of the property in the two sales, but in the view their Lordships take, this topic need not be pursued. The decree-holder denies the plaintiff's priority of title, and contends that the assurances to her were collusive and fictitious; that the sale deeds, though purporting to be of a date prior to the attachment in execution case No. 16 of 1907, were in truth executed later; and that in any case the private alienation to the plaintiff was during the continuance of an attachment, and therefore void.

First, then, as to the alienation in favour of the plaintiff being, as it is termed in the respondent's case, collusive and fictitious. It is there alleged that "the judgment-debtor, Babu Chhatrapat Singh, was, and always remained, the real owner of the properties in dispute." Strictly this means that the transaction was benami and not that it was a fraudulent transfer within the meaning of section 53 of the Transfer of Property Act. The difference is distinct, though it

is often slurred. To the suggestion that the transaction was benami, a complete answer is furnished by the admission that the judgment-debtor owed the plaintiff the amount stated to be the consideration for the sale deeds and more.

And even if the case for the decree-holder be treated as raising the further plea of a fraudulent transfer, this same admission operates strongly in the plaintiff's favour.

It may be that the judgment-debtor preferred the plaintiff, with whom he was connected by family ties, and that he did this of set purpose, yet this would not stamp the transaction as a fraudulent transfer. A debtor, for all that is contained in section 53 of the Transfer of Property Act, may pay his debts in any order he pleases, and prefer any creditor he chooses. And whatever may be suspected, and however slender the confidence that Chhatrapat may inspire, there is no evidence on which any fraudulent intention can be imputed to the plaintiff.

Had it been made out that the sale deeds to the plaintiff were really executed after the attachment in execution case 16 of 1907, then there would have been justification for a finding of fraud; though in that case the finding would have been unnecessary, for the plaintiff's title would have been defeated, apart from fraud, under the express terms of section 276 of the Civil Procedure Code.

But the contention that the sale deeds were antedated cannot be sustained. It is a general, though not a conclusive, presumption that a document was made on the day of the date it bears, so that for what it is worth the plaintiff starts with that in her favour; but her case does not rest there, for such oral evidence as there is on the point supports the presumption, and was not seriously challenged by cross-examination.

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It has been suggested that the plaintiff should have called other witnesses to the date of execution. But her advisers had no reason to apprehend that this contention would be advanced. It is not pleaded in the written statement, it is not raised in the issues, and the judgment of the First Court certainly does not suggest that it was given prominence even at the trial.

There may be ground for suspicion, and Chattrapat's treatment of his creditors in the past may engender doubt, but the Court's decision must rest, not upon suspicion, but upon legal grounds established by legal testimony. Such as it is the legal proof here is all on the plaintiff's side, while if indirect signs are sought the keenness which marked the contest as to the continuation of the execution proceedings No. 8 of 1902 is hardly intelligible unless it be assumed that both parties realised the importance of the dates, and the dates could only have possessed importance if the sale deeds had been already executed.

But then it is urged for the decree-holder that the sales to the plaintiff, even if executed on the date the kobalas bear, are, nevertheless, void under section 276 of the Civil Procedure Code. That section provides that when an attachment has been made as there described any private alienation of the property attached during the continuance of the attachment shall be void against all claims enforceable under the attachment. *Ex hypothesi*, the alienation to the plaintiff was not during the continuance of the attachment in execution case No. 16 of 1907, or, in other words, the attachment under which the execution sale to the decree-holder was made. Therefore it cannot be avoided by that attachment.

But the decree-holder argues that it was made during the continuance of the attachment in execution case No. 8 of 1902 and in support of this reliance is

placed on the order of the District Judge of the 16th August, 1907, which was affirmed on appeal by the High Court.

The plaintiff is not bound by those decisions, and their correctness has been forcibly questioned before their Lordships. But it is unnecessary and inadvisable to deal further with this point, and more especially as there is another and surer answer to the decree-holder's plea. He relies on section 295 of the Code of Civil Procedure as entitling him to the benefit of section 276, and for this purpose he calls in aid his application for attachment in execution case No. 8 of 1902. To bring section 295 into play certain conditions are necessary, and one of them is that there should be assets held by the Court. It has not been shown that there was such assets, and the indications in the record point the other way. But apart from this, section 295 cannot help the decree-holder. Though the word "attachment" occurs three times in section 276, the reference is to one, and only one, attachment; that one in this case is the attachment in execution case No. 16 of 1907. All that can be done is to employ that attachment for the purpose of impugning the private alienation, for it is on that alone that the decree-holder's title to the property in suit at present rests. So that even if it be assumed, for the sake of argument, that the view which prevailed in *Sorabji Edulji Warden v. Govind Ramji* (1), is correct, and that the conditions of section 295 have been satisfied, it cannot advance the decree-holder's case.

It still is the attachment in execution case No. 16 of 1907, that is, the only weapon of attack, and it is not made more effective by the earlier attachment in execution case No. 8 of 1902. All that earlier attachment can do in the circumstances of this case is to entitle the

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decree-holder to the benefit of the later attachment. He cannot claim to be in a better position than the decree-holder in execution case No. 16 of 1907, nor does it strengthen his position that it is the same person who is the decree-holder in both cases. To claim a higher right because the attachment in execution case No. 8 of 1902 is of an earlier date rests on an obvious confusion of thought.

The result then is that the appeal must be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge, so far as it directs that the plaintiff do get khas possession of the properties in suit, restored with costs in both Courts, and any costs paid under the decree of the High Court, must be refunded and the costs of this appeal paid by the decree-holder.

And their Lordships will humbly advise His Majesty accordingly.

J. V. W.

*Appeal allowed.*Solicitor for the appellant : *G. C. Farr.*Solicitors for the respondent : *Watkins & Hunter.*

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(AND ANOTHER APPEAL AND 2 CROSS-APPEALS
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[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Pre-emption—Decree for pre-emption—Purchaser's possession and right to rents and profits continue until full pre-emption price is paid—Civil Procedure Code, 1882, s. 214—Mahomedan law of pre-emption—Change of possession under decree.

If a claim to pre-emption be disputed, and a suit must be brought, the rights of the parties are regulated by s. 214 of the Code of Civil Procedure, which in this respect embodies the principle of the Mahomedan Law.

That section enacts that "When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid the suit shall stand dismissed with costs." It is, therefore, only on payment of the purchase-money on the specified date that the plaintiff obtains possession of the property, and until that time the original vendee retains possession, and is entitled to the rents and profits.

De skinandan v. Sri Ram(1) approved.

In the present case the decree under which possession was given to the pre-emptor (appellant) was made on 31st March 1900 by the Subordinate Judge who found that the pre-emptive price was Rs. 37,000, and on payment of that sum the pre-emptor was put into possession. The High

² *Present* : THE LORD CHANCELLOR (LORD BUCKMASTER), LORD ATKINSON, LORD WRENBURY AND MR. AMEER ALI.

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Court reversed that decree and dismissed the suit, but found that the price was Rs 44,850 as stated in the deed of sale. On 2nd July 1904, the original purchaser was put into possession. On 25th January 1908, the Privy Council set aside the decree of the High Court and restored that of the Subordinate Judge except as to the pre-emptive price which was fixed as being Rs. 44,850, and the additional sum making up that amount having been deposited, possession was again given to the pre-emptor on 19th January 1909. In proceedings in which each party claimed mesne profits from the other, the original vendee from the pre-emptor from 1900 to 1904, and the pre-emptor from the vendee from 1904 to 1909.

Held, that the possession of the vendee continued until 19th January 1909; and the pre-emptor only obtained possession within the meaning of section 214 of the Civil Procedure Code, 1882, on that date. No mesne profits therefore were due to him, but he was liable to the vendee for mesne profits from 1900 to 1904 for which period he was in possession without title.

Two consolidated appeals 95 and 96 of 1913 from a judgment and two decrees (25th February 1910) of the High Court at Calcutta which partly affirmed and partly reversed judgment and decrees (26th April 1909 and 28th August 1909) of the Court of the Subordinate Judge of Monghyr.

The decree-holders were appellants to His Majesty in Council, and the judgment-debtors were cross-appellants.

Johuri Lall (father of Deonandan Prashad) and Mangniram Marwari (father of Baijnath Goenka) were in 1897 the joint owners of a 12 annas share of Taluka Rasulpur Bhatowni, of which the remaining 4 annas share belonged to Anupbati Koeri, and tried to induce her to sell them her share for Rs. 36,000, which she refused to do. On 17th December 1897, she sold her 4 annas share to Nirbhoy Chowdhri (father of Ramdhari Chowdhri) for Rs. 44,850. Johuri Lall and Mangniram thereupon filed two suits, 248 and 249 of 1898 in the Court of the Subordinate Judge of Monghyr, against Nirbhoy Chowdhri and others in which they claimed a right of pre-emption in regard to the

4 annas share; and alleged that the value of the share was Rs. 37,000, and that Rs. 44,850 the price mentioned in the deed of sale to Nirbhoy for which it was alleged to have been sold, was a fictitious value. In those suits the Subordinate Judge made decrees that each of the plaintiffs, Johuri Lall and Mangniram, should within one month from 31st March 1900 deposit Rs. 18,500, half of Rs. 37,000, the price of the properties claimed, and that he should then be awarded possession of a moiety of the 4 annas share by right of pre-emption. Johuri Lall and Mangniram having deposited Rs. 37,000, obtained in April 1900 possession of the 4 annas share, and ousted Nirbhoy Chowdhri therefrom

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Nirbhoy appealed from that decree to the High Court and that Court (RAMPINI and PRATT JJ.) on 20th January set aside the decrees of the Subordinate Judge and dismissed the suits, holding that the plaintiffs had lost their right of pre-emption by delay in filing their suits, and that in any event the value of the properties was Rs. 44,850, and not Rs. 37,000 only as alleged by the plaintiffs.

Whilst the appeals were pending, Johuri Lal died leaving his son Deonandan Prashad; Mangniram died leaving his son Baijnath Goenka; and Nirbhoy Chowdhri died leaving his son Ramdhari Chowdhri: and these three sons were substituted on the record in place of their respective fathers.

On 20th July 1904, Ramdhari Chowdhri recovered possession from Deonandan Prashad and Baijnath Goenka, of the 4 annas share which had belonged to his father Nirbhoy Chowdhri: and on 15th January 1907, presented to the Subordinate Judge, a petition against each of the plaintiffs Deonandan and Baijnath claiming mesne profits for their occupation of the 4 annas share from April 1900 to July 1904. These

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applications were stayed on the ground that Deonandan and Baijnath had filed appeals to the Privy Council against the decrees of the High Court.

The decree of the Privy Council was made on 25th January 1908 to the effect that the decrees of the High Court should be set aside, and that those of the Subordinate Judge should be varied by calculating the price of pre-emption on Rs. 44,850 instead of on Rs. 37,000, and ordering the amounts decreed to be deposited by the respective appellants in the Court of the Subordinate Judge within such times as the High Court or a Subordinate Judge might determine; and that subject to such variations and payment to the appellants of certain costs, the decrees of the Subordinate Judge be restored and the cases be remitted to the High Court and disposed of on the above footing.

On 2nd January 1909, Deonandan Prashad and Baijnath Goenka deposited the amount of the pre-emption money (Rs. 44,850) and again got possession of the 4 annas share of the properties from Ramdhari Chowdhri.

On 6th and 7th January 1909, petitions were filed by Deonandan Prashad and Baijnath Goenka in the Court of the Subordinate Judge of Monghyr under section 144 of the Civil Procedure Code, 1908, claiming mesne profits against Ramdhari Chowdhri for the period of his occupation of the properties from 20th July 1904 to 2nd January 1909. These proceedings were described as miscellaneous cases 6 and 7 of 1909. On 7th and 11th January, Deonandan and Baijnath also filed petitions for attachment before judgment of the pre-emption money deposited by them in Court in their suits against Ramdhari Chowdhri. The respondent Ramdhari Chowdhri filed objections in miscellaneous cases 6 and 7 to the claims for mesne profits. These

cases were heard together and, on 26th April 1909, the Subordinate Judge dismissed the applications with costs. He held that a decree in a pre-emption suit was not an ordinary decree for possession, and did not entitle the decree-holder to possession of the property except on payment of the pre-emptive price within a period to be fixed by the Court, and that until such payment the vendee was entitled to retain possession, and that the title of the pre-emptor only arose on such payment. (Civil Procedure Code, 1882, section 214, and 1908 Order XX, rule 14.) He found that in the present case the proper pre-emptive price fixed was not paid until January 1909; that the decree itself made no provision for mesne profits, and that under the circumstances the pre-emptors were not entitled to any relief by way of restitution under section 144 of the Civil Procedure Code, 1908.

Deonandan Prashad and Baijnath Goenka appealed to the High Court from the decisions of the Subordinate Judge, the two appeals being numbered 365 and 366 of 1909.

On 26th April 1909, Ramdhari Chowdhri filed two petitions in the Court of the Subordinate Judge (in continuance of his applications of 15th January 1907, claiming mesne profits for the period of the occupation of the properties in suit from April 1900 to 2nd July 1904, by Deonandan Prashad and Baijnath Goenka. These were described as miscellaneous cases 66 and 67 of 1909. To these petitions objections were filed by Deonandan and Baijnath.

On 28th August, 1909, the Subordinate Judge made a decree, in the two cases which were heard together, in favour of Ramdhari for mesne profits during the period claimed under section 144 of the Civil Procedure Code, 1908. He held that the pre-emptors had

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been in possession during the period in question without having paid the full pre-emptive price, which they did without being so entitled. He also held the petitioner's remedy was not barred by limitation, as contended by the objectors.

On 14th September 1909, Deonandan Prashad and Baijnath Goenka appealed to the High Court against the judgments and decrees of 28th August numbered 538 and 537, respectively.

The High Court (BRETT and SHARFUDDIN JJ.) gave one judgment in all the appeals, which were all heard together. In appeals 365 and 366, in which Deonandan and Baijnath claimed mesne profits, the High Court affirmed the decision of the Subordinate Judge, and dismissed the appeals.

In appeals 537 and 538 which granted to the vendee Ramdhari Chowdhri mesne profits as claimed by him, the High Court set aside the decree of the Subordinate Judge and decreed the appeals. In those appeals the High Court held that as it appeared from the plaints in suits 248 and 249 of 1897 that the pre-emptors had been then prepared to pay the full pre-emptive price Rs. 44,850, but which they did not actually pay into Court; and as it had been held by the Privy Council that they had been prepared on 7th January 1898 when making their formal preliminary claim to pre-emption, to pay that full price, it would be inequitable to hold that their possession under the decrees of the Subordinate Judge who had held that Rs. 37,000 was the proper price, was wrongful so as to entitle Ramdhari Chowdhri to recover mesne profits from them for that period.

On these appeals,

De Gruyther, K. C., and *B. Dubé*, for the appellants (the pre-emptors), contended that they were entitled

to recover mesne profits for the period they were out of possession of the property in dispute (20th July 1904 to 19th January 1909), by reason of the erroneous decree of the High Court. They were entitled to pre-emption, and had their title to, and right to possession of, the property when they paid the sum decreed by the Subordinate Judge in 1900 : and when that decree was affirmed by the Privy Council (with a variation only of the pre-emptive price), they had the same rights when they had paid the difference between Rs. 37,000, and Rs. 44,850 in January 1909. They were therefore not in wrongful possession from 1900 to 1904, and not accountable for any mesne profits for that period. When also they were put again in possession in January 1909 it was by virtue of the same rights as before, and was, it was submitted, in effect a declaration that Ramdhari Chowdhri had been in wrongful possession of the property from 1904 to 1909, which entitled the pre-emptors to mesne profits for that period of five years. They had lost the interest on the Rs. 37,000 which they had paid under the original order of the Subordinate Judge. As they had established their right of pre-emption, it was only equitable that they should get the benefit of that right in the mesne profits they claimed. Reference was made to Baillie's Mahomedan Law, page 550 ; Civil Procedure Code, 1882, section 214 ; and Civil Procedure Code, 1908, section 144 ; and Order XX, rule 14. The Chowdhris were, it was contended, not entitled to recover any mesne profits.

A. M. Dunne, for the respondents, contended that Ramdhari Chowdhri was absolutely entitled to the possession of the property until payment to him of the proper pre-emptive price. The right to mesne profits was a question of law which depended entirely upon the right to possession : the High Court was

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wrong in dealing with the matter on equitable principles. Under section 214 of the Civil Procedure Code, 1882, the pre-emptors were only entitled to possession from the date when they paid the price finally decreed by the order of the Privy Council: reference was made to *Deokinandan v. Sri Ram* (1). They had no right to the possession of the property for the period from April 1900 to 2nd July 1904. Nor had they established any right to mesne profits against Ramdhari Chowdhri for the period of his possession from July 1904 to January 1909. The finding of the Subordinate Judge that the pre-emptive price was only Rs. 37,000 was a result of the case set up by the pre-emptors which challenged the amount of the consideration for the sale to the vendees. The pre-emptors, it was submitted, were not entitled to any benefit by way of restitution under section 144 of the Civil Procedure Code, 1908, nor, if that was not applicable, under section 583 of the Code of 1882. The respondents were entitled to mesne profits from April 1900 to 2nd July 1904 under section 144 of the Civil Procedure Code, 1908, as held by the Subordinate Judge on 28th August 1909.

De Gruyther, K.C., in reply, referred to *Gobind Dyal v. Inayatullah* (2). The pre-emptors offered Rs. 44,850 for the property which was refused: now it has been found that was the proper sum to be paid; so that we are wronged by our offer, rightly made, not having been accepted.

The judgment of their Lordships was delivered by

Dec. 11.

THE LORD CHANCELLOR. The question in these appeals affects the right to mesne profits of certain lands which, by virtue of three different sets of judgments—*first*, two decrees of the Subordinate Judge

(1) (1889) I. L. R. 12 All. 234, 236. (2) (1885) I. L. R. 7 All. 775, 809

on the 31st March, 1900; *secondly*, two decrees of the High Court at Calcutta on the 20th January, 1904; and, *thirdly*, an Order in Council on the 25th January, 1908—have been alternately in the possession of Deonandan Prashad Singh and Baijnath Ram Goenka or their predecessors in title (hereafter, for convenience, called the appellants), Ramdhari Chowdhri and others or their predecessors in title (hereafter called the respondents), and, finally, of the appellants again. The explanation of this changing occupation is to be found in the nature of the proceedings in which those orders were made.

On the 30th June, 1898, two suits were brought by the two predecessors of the appellants each claiming a right to pre-empt a half share in certain property known as Taluka Rasulpur Bhatowni, which, on the 17th December, 1897, one Anupbati Koeri sold to Nirbhoy Chowdhri. The sale was alleged by the purchaser to have been made for 44,850 rupees, and this amount was stated as the consideration in the deed of sale. The plaintiffs' right to pre-empt does not seem to have been questioned; the only matter in dispute was whether they had made, in accordance with the rules of the Muhammadan law to which the right is subject, the "demands," which are a condition precedent to the exercise of the rights of pre-emption. The plaintiffs alleged they had duly performed the necessary formalities and also that they had offered to pay the full purchase price. The purchaser, however, declined to recognise their rights, and it accordingly became necessary to institute proceedings. Unfortunately, in those proceedings, the plaintiffs challenged the reality of the purchase price named in the deed, and alleged that the real purchase price was 37,000 rupees, and not 44,850. The defendant denied the right of pre-emption, and asserted that the full

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consideration was the true consideration for sale. The plaintiffs succeeded on both their contentions, and, by the decrees of the 31st March, 1900, to which reference has been made, the Subordinate Judge ordered that each of the plaintiffs should, within one month from the date thereof, deposit in the Court 18,500 rupees—half of the 37,000 rupees the price of the property claimed, and then be awarded possession of the half share of the property claimed by right of pre-emption. The money was duly paid by both the plaintiffs, and possession of the estates was delivered to them on the 19th July 1900.

The judgment of the High Court reversed this judgment and set aside these decrees, declaring that there was no right of pre-emption, and that the full consideration for the sale was 44,500 rupees. Possession of the estate was accordingly re-delivered to the original purchaser on the 20th July, 1904.

The Order of the Privy Council on appeal from the High Court was dated the 25th January, 1908; this declared that the right of pre-emption existed, and that the purchase price was that stated in the deed; accordingly the decrees of the High Court were discharged, and it was further ordered that the decrees of the Subordinate Judge should—

“ . . . be varied by calculating the price of pre-emption on the sum of 44,850 rupees instead of on the sum of 37,000 rupees and by ordering the amounts in question to be deposited by the respective appellants in the Court of the said Subordinate Judge within such times as the said High Court or the Court of the said Subordinate Judge may determine that subject to these variations and the payment to the appellants of additional costs (if any) properly incurred by them, the said decrees of the Court of the said Subordinate Judge be and the same are hereby remitted to the said High Court in order that the necessary steps may be taken for the disposal thereof on the above footing.”

It appears that during all this time the two sums of 18,500 rupees had remained in Court, uninvested as the

appellants suggest, though their Lordships cannot but think it unlikely that so large a sum should be left idle during the whole long and indeterminate time of Indian litigation. Accordingly the plaintiffs were only bound to find the balance of 7,850 rupees, and this having been done the plaintiffs were restored to possession on the 19th January, 1909.

In working out the Order in Council, a question has naturally arisen as to the right to mesne profits between the 19th July, 1900, and the 19th January, 1909. The respondents, as representing the original purchaser, claim to be entitled to the whole mesne profits between these dates upon the ground that the appellants are only in possession under the Order in Council. The appellants, on the other hand, assert their right because they urge they were rightly in possession under the original decrees, and that that possession was wrongfully taken away by the order of the High Court. The High Court, from whom the present appeal has been brought, have settled the matter by giving mesne profits during the one period to the appellants, and during the other period to the respondents. But though this order might be a fair way of adjusting the rival claims of the parties were they uncontrolled by statute, their Lordships are unable to find that they are free to deal with it in this manner.

A person claiming an order of pre-emption cannot be regarded in the same light as an ordinary purchaser of an estate. His right is, when an estate has been sold, to acquire the property from the purchaser at the price paid. If the necessary formalities are observed, and the purchaser assents to the claim, possession is given by mutual consent and no difficulty arises; but if the claim be disputed and a suit must be brought, the rights of the parties are regulated by the Code of

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Civil Procedure, which in this respect embodies the principle of the Mahomedan law. Section 214 of the Code of 1882 is in these words :—

"214. When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid the suit shall stand dismissed with costs."

It, therefore, follows that where a suit is brought, it is on payment of the purchase money on the specified date that the plaintiff obtains possession of the property, and, until that time, the original purchaser retains possession and is entitled to the rents and profits. This was so held in the case of *Deokinandan v. Sri Ram* (1) and there Mr. Justice Mahmud, whose authority is well recognised by all, stated that it was only when the terms of the decree were fulfilled and enforced that the persons having the right of pre-emption become owners of the property, that such ownership did not vest from the date of sale, notwithstanding success in the suit, and that the actual substitution of the owner of the pre-empted property dates with possession under the decree.

Now, in the present case, the decrees under which possession was given of the pre-empted property are the decrees of the Subordinate Judge, not, indeed, those of the 31st March, 1900, but those decrees as varied by the Order in Council of the 25th day of January, 1908, for at that date the original decrees of the Subordinate Judge had been set aside, and were only restored upon the terms mentioned in the judgment of the Privy Council. So varied, they provided that upon the deposit by each plaintiff of 22,425 rupees

—half of the 44,850 rupees—he should then be awarded possession. Until that deposit was made possession could not be taken. If it had not been made, possession could never have been assumed at all, and, in their Lordships' opinion, it follows that the plaintiffs only obtained possession within the meaning of the Code in pursuance of that order, that is to say on the 19th January, 1909.

Their Lordships fear that this opinion, to which they are compelled by the terms of the Code, may involve some hardship upon the plaintiffs; but it must be remembered that this is due to two matters, one of which was wholly and the other to some extent under the plaintiffs' control. The first and the fundamental error was in challenging the consideration for the sale. Apart from this, their possession would have been lawful throughout, and the Order in Council would merely have confirmed the decrees of the Subordinate Judge and prevented the decree of the High Court from having any effect. But, apart from this, their loss might have been materially lessened had they proceeded with diligence in their appeal from the judgment of the High Court. This was given on the 21st January, 1904, and it was not till four years afterwards that the matter came before the Judicial Committee for decision, though there need be no delay in the hearing of appeals when once they are entered here. The 30th June, 1898, was the date when proceedings were commenced, and it is not until nearly ten years afterwards that the final decree is obtained. Their Lordships realise and desire to make full allowance for the difficulties due to translation of documents, printing, and preparation of the record, and all the circumstances attaching to habits and ideas different from their own; but delay in litigation means to every one concerned, in whatever country he may be, needless

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expense, anxiety and disappointment, and to the poor and honest suitor it is an oppression hard to be borne.

In the result, therefore, the appellants fail and the respondents succeed. Their Lordships will therefore humbly advise His Majesty that the two decrees of the High Court, both dated the 25th February, 1910, made in Appeals Nos. 365 and 366 of 1909, should be affirmed, and that the two decrees of the High Court, both dated the 25th February, 1910, made in Appeals Nos. 537 and 538 of 1909, should be set aside except as to costs, and that the decrees of the Court of the Subordinate Judge, dated the 28th August, 1909, should be restored except as to costs. It follows that the appellants' appeal should be dismissed and the respondents' cross-appeals allowed. As regards costs, the High Court order each party to bear their own costs in both the Indian Courts. This part of the High Court's order will not be disturbed, and there will be no costs in these appeals.

J. V. W.

*Appeals dismissed;
Cross-appeals allowed.*

Solicitors for the appellants: *Watkins & Hunter.*

Solicitors for the respondents: *T. L. Wilson & Co.*

APPELLATE CIVIL.

Before Mookerjee and Cuming JJ.

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Public Drain—House drain—Title—Calcutta Municipal Act (Beng. III of 1899), ss. 3, cl. (16), 286, 337—Vesting of a street in a municipality—Its effect—Rights of the owner.

The legal effect of the statutory vesting of a street in a municipality is not to transfer to the municipality the ownership in the site or soil over which the street exists. The effect of the statutory provision is merely to vest in them the property in the surface of the street, road or drain and in so much of the actual soil below and air above as may reasonably be required for its control, protection and maintenance as a highway or drain for the use of the public. The Court will not presume that the intention of the Legislature was to confiscate private property and vest it in a public corporation without compensation granted to the proprietor. The right of the owner was intended to be abridged only to the extent necessary for the discharge of the statutory duties imposed on the Corporation for the benefit of the public.

The property of the local authority concerned does not extend further than is necessary for the maintenance and use of the highway as a highway; that, subject to this qualification, the original owner's rights and property remain, and that if the highway ceases to be a highway the owner becomes entitled to full and unabridged rights of ownership in the property.

Sundaram Ayyar v. Municipal Council of Madura (1) and *Madathapu Ramaya v. Secretary of State for India* (2) followed.

Chairman of the Naihati Municipality v. Kishori Lal Goswami (3)

* Appeal from Appellate Decree, No. 184 of 1912, against the decree of Bhagabati Charan Mitra, Subordinate Judge of 24-Parganas, dated Sep. 20, 1911, modifying the decree of Amrita Lal Palit, Munsif of Alipore, dated July 27, 1911.

(1) (1901) I. L. R. 25 Mad. 635. (2) (1903) I. L. R. 27 Mad. 386.

(3) (1886) I. L. R. 13 Calc. 171.

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Modhu Sudan Kundu v. Promda Nath Roy (1), *Chairman of the Howrah Municipality v. Khetra Krishna Mitter* (2), *Nihal Chand v. Azmat Ali* (3), *Nagar Valab Narsi v. The Municipality of Dhandhuka* (4), *The Municipal Commissioners of Madras v. Sarangapani Mudaliar* (5), *Sundaram Ayyar v. The Municipal Council of Madura* (6), *Madathapu Ramay v. Secretary of State for India* (7), *The Mayor of Tunbridge Wells v. Baird* (8), *Municipal Council of Sydney v. Young* (9), *Finchley Electric Light Co. v. Finchley Urban Council* (10), *Foley's Charity Trustees v. Dudley Corporation* (11), *London and N. W. Ry. Co. v. Westminster Corporation* (12), *Lodge Holes Colliery Co. v. Wednesbury Corporation* (13), *Battersea Vestry v. County of London* (14) referred to.

SECOND APPEAL by Gunendra Mohan Ghosh and others, the plaintiffs.

This appeal arose out of a suit for declaration of the plaintiffs' title to the land of the drain just to the west of their premises No. 13-3, Circular Garden Reach Road and just to the East of that Road as appertaining to their premises aforesaid, and for an injunction upon the defendant Corporation from interfering with the drain on the declaration that the Corporation has no right to the same or has at least subordinate right to it.

The Court of first instance found for the plaintiffs on the question of title and granted them a perpetual injunction. On appeal, the Subordinate Judge dismissed the suit. On second appeal to this Court, the case was remanded for re-consideration with special reference to an *amalnama* produced by the plaintiffs in proof of their alleged title to the land in controversy. Thereupon the Court of first instance recorded the evidence mentioned in the order of remand and decreed

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| (1) (1893) I. L. R. 20 Calc. 732. | (8) [1896] A. C. 434. |
| (2) (1906) I. L. R. 33 Calc. 1290, 1303. | (9) [1898] A. C. 457. |
| (3) (1885) I. L. R. 7 All. 362. | (10) [1903] 1 Ch. 437. |
| (4) (1887) I. L. R. 12 Bom. 490. | (11) [1910] 1 K. B. 317. |
| (5) (1895) I. L. R. 19 Mad. 154. | (12) [1905] A. C. 426. |
| (6) (1901) I. L. R. 25 Mad. 635. | (13) [1908] A. C. 323. |
| (7) (1903) I. L. R. 27 Mad. 386. | (14) [1899] 1 Ch. 474. |

the suit. The Corporation, then, appealed to the Subordinate Judge. The Subordinate Judge passed a decree declaring plaintiffs' rights *only* to the site of the drain, that is, the land in which it stands and held that the drain as such vested in the Calcutta Corporation and the plaintiffs' right to the drain as such was extinguished. The prayer for injunction was rejected. Hence this appeal by the plaintiffs to this Court.

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Babu Bhudeb Chandra Roy, for the appellants.

Babu Debendra Chandra Mullick, for the respondents.

Cur. adv. vult.

MOOKERJEE AND CUMING JJ. This is an appeal by the plaintiffs in a suit for declaration of title to land and for a perpetual injunction to restrain the defendant Corporation from interference with them in the exercise of their rights as proprietors. The case for the plaintiffs is that the disputed land appertains to their premises 13-3, Circular Garden Reach Road, that their predecessor constructed a drain thereon for the outlet of water from the premises, and that on the 29th May 1906, two of the officers of the Corporation had caused the land to be included within the boundaries of the adjoining street. The plaintiffs assert that such unlawful action on the part of the Corporation had rendered it necessary for them to obtain a declaration of their title and an injunction so as to secure them from future interference. The defendant Corporation resisted the claim on the ground that the land was not the property of the plaintiffs, that the drain was a part and parcel of the public street, and that it was in any event a public street within the meaning of section 336 of Beng. Act III of 1899, and had become vested in the Corporation

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and was their property. The Court of first instance found in favour of the plaintiffs on the question of title, and granted them a perpetual injunction. On appeal, the Subordinate Judge reversed this decision and dismissed the suit. On second appeal to this Court, the case was remanded for re-consideration with special reference to an *amalnama* produced by the plaintiffs in proof of their alleged title to the land in controversy. The Subordinate Judge, after remand, has declared the title of the plaintiffs to the site of the drain, but has refused the injunction on the ground that as the drain had vested in the Corporation, the right of the plaintiffs had been extinguished. The decree as drawn up is possibly not in exact conformity with the judgment. The plaintiffs have now appealed to this Court and have pressed their claim for an injunction; there is no cross-appeal by the Corporation upon the question of title. Consequently, we must proceed upon the assumption that the land in suit covered by the drain appertains to the premises owned by the plaintiffs.

Section 286 of the Calcutta Municipal Act, 1899, provides that all public drains and all drains in, alongside or under any public street, whether made at the charge of municipal funds or otherwise, and all works, materials and things appertaining thereto, shall vest in the Corporation. The drain which passes over the land in suit is not a public drain within the meaning of this section, but is a drain alongside a public street. Section 3, clause (16), shows that the term drain includes a house drain; consequently the fact that the drain is a house drain, made by the owner of the adjoining premises for the outlet of water therefrom, does not exclude it from the operation of section 286. What then is the precise effect when, under section 286, a drain vests in the

Corporation; does the Corporation thereby become the proprietor of the soil? The question is by no means of first impression. It has been ruled in a long series of decisions that when a road or a drain vests in the Municipality, the effect is not to confer the full proprietary right in the soil itself covered by the road or the drain on the Commissioners: *Chairman of the Naihati Municipality v. Kishori Lal* (1), *Modhu Sudan v. Promoda Nath* (2), *Chairman of the Howrah Municipality v. Khetra Krishna* (3), *Nihal Chand v. Azmat Ali* (4), *Nagar v. Municipality of Dhandhuka* (5), though possibly a different view was taken in *Municipal Commissioners of Madras v. Sarangapani* (6). The principle applicable to cases of this character was elaborately examined by Sir V. Bhashyam Ayyangar J. in *Sundaram v. Municipal Council of Madura* (7) which was followed in *Madathapu v. Secretary of State* (8). It was pointed out that the legal effect of the statutory vesting of a street in a Municipality is not to transfer to the Municipality the ownership in the site or soil over which the street exists; the street, *qua* street, vests in the Municipality, that is, the surface and so much of the air space above and so much of the soil below the surface as is reasonably necessary to enable the Municipality adequately to maintain and manage the street as a street, was vested in and belonged to the Municipality. This conclusion is in conformity with what has been recognised as settled law in England and America. In England, the effect of a statutory provision whereby a road or drain is made to vest in a County Council or County Borough, is not to

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(1) (1886) I. L. R. 12 Calc. 171.

(5) (1887) I. L. R. 12 Bom. 490.

(2) (1893) I. L. R. 20 Calc. 732.

(6) (1895) I. L. R. 19 Mad. 154.

(3) (1906) I. L. R. 33 Calc. 129, 1303. (7) (1901) I. L. R. 25 Mad. 635.

(4) (1885) I. L. R. 7 All. 362.

(8) (1903) I. L. R. 27 Mad. 386.

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transfer the free-hold to the authority concerned, but merely to vest in them the property on the surface of the street, road or drain and in so much of the actual soil below and air above as may reasonably be required for its control, protection and maintenance as a highway or drain for the use of the public; to this extent only, the owner is divested of his property. The Courts will not presume that the intention of the Legislature was to confiscate private property and vest it in a public corporation without compensation granted to the proprietor. The reasonable inference, on the other hand, is that the right of the owner was intended to be abridged, only to the extent necessary for the discharge of the statutory duties imposed on the corporation for the benefit of the public. Reference may usefully be made to the decision of the House of Lords in *Tunbridge Corporation v. Baird* (1), and of the Judicial Committee in *Municipal Council of Sydney v. Young* (2). In the former case, Lord Halsbury held that the street, *qua*-street, and so much of the actual soil of the street as might be necessary for the purpose of preserving, maintaining and using it as a street, had vested in the Corporation. Lord Herschell added that the vesting of the street vested in the urban authority such property and such property only as was necessary for the control, protection and maintenance of the street as a highway for public use. In the latter case, Lord Morris observed that the vesting of a street vested no property in the Municipality, beyond the surface of the street and such portion as might be absolutely necessarily incidental to the repairing and proper management of the street; it did not vest the soil or the land in them as owners, that is, the street vested in them *qua*-street and not as general property. The

(1) [1896] A. C. 434.

(2) [1898] A. C. 457.

doctrine thus formulated has been recognised and applied in a variety of cases: *Bagshaw v. Buxton Local Board* (1), *Rolls v. Saint George Vestry* (2), *Wandsworth Board v. London and S. W. Railway Co.* (3), *Finchley Electric Light Co. v. Finchley Urban Council* (4), *Coverdale v. Charlton* (5), *Poplar Corporation v. Millwall Dock Co.* (6), *Hyde Corporation v. Oldham* (7), *Foley v. Dudley Corporation* (8), *London and N. W. Railway Co. v. Westminster Corporation* (9), *Lodge H. C. Co. v. Wednesbury Corporation* (10), *Wandsworth v. United Telephone Co.* (11), *Battersea Vestry v. County of London* (12), *Mayor of Birkenhead v. L. N. W. Railway Co.* (13), *Lord Provost of Glasgow v. Glasgow S. W. Railway Co.* (14). No useful purpose would be served by a minute analysis of the varying circumstances of these decisions; but the general principle deducible may be summarised to be that the property of the local authority concerned does not extend further than is necessary for the maintenance and use of the highway as a highway, that, subject to this qualification, the original owner's rights and property remain, and that if the highway ceases to be a highway, the owner becomes entitled to full and unabridged rights of ownership in the property. A similar view has been adopted in the Courts of the United States, where the question of the precise interest taken by the Municipal Corporation has sometimes arisen in relation to title to underground minerals or alluvial accretions. The doctrine has been adopted that the property or estate vested

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| (1) (1875) 1 Ch. D. 220. | (8) [1910] 1 K. B. 317. |
| (2) (1880) 14 Ch. D. 785. | (9) [1905] A. C. 426. |
| (3) (1862) 31 L. J. Ch. 854. | (10) [1908] A. C. 323. |
| (4) [1903] 1 Ch. 437. | (11) (1884) 13 Q. B. D. 904. |
| (5) (1878) 4 Q. B. D. 104. | (12) [1899] 1 Ch. 474. |
| (6) (1904) 68 J. P. 339. | (13) (1885) 15 Q. B. D. 572. |
| (7) (1900) 64 J. P. 596. | (14) [1895] A. C. 376. |

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in the Municipality is such only as is necessary for street purposes and is in trust for public uses and not for purposes of profit and emolument: Dillon on Municipal Corporations (1911), Vol. III, page 1691, *Banks v. Ogden* (1), *Thomas v. Hunt* (2), *Donovan v. Allert* (3), *City of Leadville v. Bohn Mining Co.* (4). In some of these cases, reference was made with approval to the decisions in *Tunbridge Wells v. Baird* (5), *Coverdale v. Charleton* (6), *Wednesbury v. Lodge Holes Colliery Co.* (7) in support of the view that the intent and purpose of a Municipal Statute is to clothe the city, in its governmental capacity, with the entire title to the streets, as such, for public use, and not for the profit or emolument of the city, in other words, the interest or estate thus conferred upon the Corporation is limited and not absolute, limited by the purposes which the Legislature had in view when the Corporation was created.

In the light of these principles, it is obvious that there was no foundation for the claim of the Corporation to include the disputed land within the boundaries of municipal land. The plaintiffs are accordingly entitled not merely to a declaration of their title, which has been unsuccessfully contested by the Corporation, but also to a perpetual injunction. The injunction will restrain the Corporation, its officers and servants, from interfering with the exercise by the plaintiffs of their right of ownership in the disputed land, except in so far as such interference may reasonably be required for the control, protection

(1) (1867) 2 Wallace 57.

(2) (1896) 134 Mo. 392;
 32 L. R. A. 857.

(3) (1902) 11 N. D. 289;
 58 L. R. A. 775.

(4) (1906) 37 Colo. 248;
 8 L. R. A.-N. S. 422.

(5) [1896] A. C. 434.

(6) (1878) 4 Q. B. D. 104.

(7) [1907] 1 K. B. 78;

[1908] A. C. 328.

and maintenance of the drain thereon for the use of the public.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside in so far as it dismisses the claim for a perpetual injunction. In supersession of the decree of the Subordinate Judge, a decree will be made to the following effect:

"The title of the plaintiffs is declared to the disputed land; it is further declared that the drain thereon has vested in the Municipality as a drain. The defendant Corporation, its officers and servants, are hereby perpetually restrained from interfering with the plaintiffs in the exercise of their rights as proprietors of the disputed land, except where such interference may reasonably be required for the control, protection and maintenance of the drain for the use of the public."

As the plaintiffs have substantially succeeded, they are entitled to their costs in all the Courts.

S. K. B.

Appeal allowed.

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APPELLATE CIVIL.

Before N. R. Chatterjea and Sheepshanks JJ.

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July 14.

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v.

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Res Judicata—Finding in claim case, if *res judicata* re other properties—
Civil Procedure Code (Act V of 1908), O. XXI, r. 63, effect of—
Wakf, validity of.

Properties A and B are included in an alleged wakf. The finding in a claim case regarding A that the wakf is a fraudulent transaction is not conclusive in a suit for declaration and possession regarding a share in B.

An order in a claim case is conclusive only as regards the particular property in dispute.

Held, further, that a wakf having been given effect to during the lifetime of the wakifs, is valid and irrevocable.

Surnamoyi Dasi v. Ashutosh Goswami (1), *Koyyana Chittemma v. Doosy Gavaramma* (2), *Ramu Aiyar v. A. L. Palaniappa Chetty* (3) distinguished.

Radha Prasad Singh v. Lal Sahab Rai (4), *Dinkar Ballal Chakradev v. Hari Shridhar Apte* (5) referred to.

APPEAL by the plaintiff, Ashna Bibi and others.

The facts necessary for the purposes of this report are shortly these. The plaintiff, Syed Hasil Prodhan, brought a suit for a declaration of his title to certain properties as the residuary heir of one Shane Ali. On the 10th June 1898 the said Shane Ali and his step-mother, the respondent No. 5 Joygunnessa Bibi, had

* Appeal from original Decree, No. 442 of 1914, against the decree of Annada Kishore Datta Roy, Subordinate Judge of Jalpaiguri, dated June 5, 1914.

(1) (1900) I. L. R. 27 Calc. 714.

(3) (1910) I. L. R. 35 Mad. 35.

(2) (1905) I. L. R. 29 Mad. 225.

(4) (1890) I. L. R. 13 All. 53.

(5) (1889) I. L. R. 14 Bom. 206.

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executed a wakfnamah with respect to certain properties in dispute. On the 28th April 1907 Shane Ali died without issue. The plaintiff alleged that by the terms of the wakfnamah Shane Ali was the first mutwalli and after his death his step-mother the respondent No. 5 was the next mutwalli; that the said wakfnamah was fraudulent and was never acted upon. After the death of Shane Ali some of the properties covered by the wakfnamah were attached in execution of decrees and sold by the creditors and in the claim case the wakfnamah was declared to be invalid as having been executed with a view to defraud creditors.

On the death of the plaintiff, Syed Hasil Prodhan, Ashna Bibi and others were substituted in his place.

The Court of first instance found the wakfnamah to be valid on the ground that effect was given to it during the lifetime of Shane Ali in respect of the provisions of the said wakfnamah and the property covered by it was in fact treated as dedicated property, and dismissed the suit.

From this decision the plaintiff appealed to the High Court.

Mr. A. Rasul (with him *Babu Jyotish Chandra Sarkar*), for the appellants, contended that the question of the validity or invalidity of the wakf having been decided in a previous case, could not be gone into now as it was *res judicata*. The order which held the wakf to be invalid was conclusive as no suit was brought under O. XXI. r. 63. According to Mahomedan Law the wakf was invalid, inasmuch as the intention of the wakifs was to enrich their family and defraud their creditors: see *Ramu Aiyar v. A. L. Palaniappa Chetty* (1), *Koyyana Chittemma*

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v. *Doosy Gavaramma* (1), *Radha Prasad Singh v. Lal Sahab Rai* (2) and *Surnamoyi Dasi v. Ashutosh Goswami* (3).

Babu Jitendra Nath Roy, for the respondent No. 5, contended that no issue between the plaintiff appellant and the present respondents having been raised in the claim case, the validity of the wakf could not be *res judicata*. Under O. XXI, r. 63, the order was conclusive only with respect to the particular right which was claimed to the property in dispute: see *Kedar Nath Chatterji v. Rakhal Das Chatterji* (4), *Dinkar Ballal Chakradev v. Hari Shridhar Apte* (5).

Babu Nakuleswar Mukerjee, for the respondent No. 6.

Mr. A. Rasul, in reply.

Cur. adv. vult.

N. R. CHATTERJEA AND SHEEPSHANKS JJ. In the suit out of which this appeal arises plaintiff sued as the residuary heir of one Shane Ali to recover his share of certain property left by Shane Ali. He has been found to be the residuary heir of Shane Ali, and this finding has not been challenged on appeal.

The learned Subordinate Judge has dismissed his suit, holding that the property claimed is wakf property, and against this decision the plaintiff appeals.

His main ground of appeal is that the question of the validity of the wakf is *res judicata*, the alleged wakf having been decided in a claim case brought in the course of previous execution proceedings not to have been a *bonâ fide* document, but to have been put forward for the purpose of defeating the claims of creditors. The property which was the subject of the

(1) (1905) I. L. R. 29 Mad. 225.

(3) (1900) I. L. R. 27 Cal. 714.

(2) (1890) I. L. R. 13 All. 53.

(4) (1888) I. L. R. 15 Cal. 674.

(5) (1889) I. L. R. 14 Bom. 206.

claim case is not the property which is now in suit. It is argued in support of the appeal that all the parties to the present suit having been made parties to the claim case, and the order in the claim case not having been challenged by a suit under O. XXI, rule 63, that order is conclusive and operates as *res judicata* in respect not only of the property to which it related, but of all the property included in the wakf. It is admitted on behalf of the appellant that there is no authority which directly supports this argument. Reference, however, is made to *Surnamoyi Dasi v. Ashutosh Goswami* (1), *Koyyana Chittemma v. Drosy Gavaramma* (2) and *Ramu Aiyar v. A. L. Palanippa Chetty* (3). None of these cases lend any support to the appellant's contention. The first of them decides that an order in a claim case is conclusive against persons whose title is derived from the claimant, whether their position is that of plaintiffs or defendants. The second merely decides the effect of payment of the decretal amount when made more than a year after the order rejecting the claim. The third decides that persons claiming through the parties in a claim case do not cease to be bound by the order, if they subsequently acquire other rights. There is nothing in any of these decisions which is of any assistance to the appellant. In the present case the appeal must fail, for the reasons that apart from any other considerations, an order in a claim case is conclusive only as regards the particular property in dispute: *Radha Prasad Singh v. Lal Sahab Rai* (4); *Dinkar Ballal Chakradev v. Hari Shridhar Apte* (5). In this case it is clear that the order in the claim case on the question of the validity of the wakf is not

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(1) (1900) I. L. R. 27 Calc. 714. (3) (1910) I. L. R. 35 Mad. 35.

(2) (1905) I. L. R. 29 Mad. 225. (4) (1890) I. L. R. 13 All. 53.

(5) (1889) I. L. R. 14 Bom. 206.

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conclusive, the property in dispute not being that which was the subject of the claim case, and this ground of appeal fails.

It is next argued on behalf of the appellant that the alleged wakf was in fact invalid and fraudulent and was never acted upon. The evidence given by plaintiff's own witnesses is, as the learned Subordinate Judge points out, fatal to this contention. That evidence shows that effect was given in Shane Ali's lifetime to the provisions of the wakf and that the property was in fact treated as dedicated property. There is nothing to show that the transaction was a fraudulent one. The property covered by the wakf comprised only a portion of Shane Ali's property, and there is nothing to show that, as is suggested on behalf of the appellant, he was encumbered by debts and wished to defraud his creditors by means of a colourable wakf. This being so, the fact that the defendants since the death of Shane Ali have not carried out the provisions of the wakfnama, but have treated the property as their own, does not in any way affect the validity of the wakf. The wakf was created by a living man, and is therefore irrevocable.

This ground of appeal, therefore, also fails. The result is that the appeal is dismissed. Having regard to the circumstances of the case, we make no order as to costs.

L. R.

Appeal dismissed.

CRIMINAL REVISION.*Before Sanderson C. J. and Richardson J.***HRISHIKESH MANDAL**

v.

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Aug. 9.

Acquittal—Reference therefrom to High Court by District Magistrate—Revision, hearing of, on evidence, whether appeal—Appeal from acquittal by the Local Government—Criminal Procedure Code (Act V of 1898), ss. 417, 435, 438—Jurisdiction—Practice.

In the case of an acquittal, when the Local Government has not preferred an appeal under s. 417 of the Criminal Procedure Code, the High Court ought not to interfere in revision, on a reference under s. 438, where it cannot do so without practically hearing the case on the evidence as an appeal in order to satisfy itself that the opinion of the referring Court is correct, though it has jurisdiction to intervene in revision in such cases.

Faujdar Thakur v. Kasi Chowdhury (1) referred to.

REFERENCE under s. 438 of the Criminal Procedure Code by the District Magistrate of Burdwan on the motion of Hrishikesh Mandal, the complainant.

One Hrishikesh Mandal filed a petition of complaint before Babu Jagadis Chandra Lahiri, Sub-Deputy Magistrate of Katwa, against Abadhaut Mandal, Nirsingha Mandal and three others to the following effect:—There was a log of wood in a pit in front of complainant's house. Accused Abadhaut and others came up and ordered complainant's father Radhika to remove the log alleging that the land belonged to the accused. Radhika denied this and refused to take

* Criminal Revision No. 91 of 1916, in support of the order of reference by P. H. Waddel, District Magistrate of Burdwan, dated May 31, 1916, against the order of acquittal by Jagadish Chandra Lahiri, Sub-Deputy Magistrate of Katwa, dated March 9, 1916.

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away the log whereupon the accused began to do so forcibly, and on Radhika protesting beat him severely with *lathis*. Complainant Hrishikesh came up to help his father and was also beaten. Abadhaut struck him a blow which broke one of his fingers. Complainant's brother Harendra was also attacked. The defence story was that complainant's father Radhika pulled down part of his wall in order to make an opening for driving carts over the adjoining land of the accused (Abadhaut) who began to erect a parallel wall to stop this, and there was an altercation after which Abadhaut was beaten by complainant's party. The Sub-Deputy Magistrate of Katwa framed charges under sections 147, 325 of the Penal Code against Abadhaut Mandal and under sections 147, 323 against the other four accused, but on the 9th March 1916 acquitted all the accused under section 258 of the Criminal Procedure Code. The complainant thereupon moved the District Magistrate of Burdwan who, on 31st May 1916, made a reference to the High Court under section 438 of the Code of Criminal Procedure, with the following remarks (after analysing the evidence): "I would submit that it is an error of law on the part of the Magistrate to make statements unsupported by or at variance with the recorded evidence. The Magistrate has taken a grossly biased and distorted view of the case. His judgment shows that he did not honestly and impartially apply his mind to the actual evidence before him. A fair trial has not been had, and in my view a grave failure of justice has been occasioned. The complainant and his father have suffered grievous hurt and had no remedy. I would accordingly request that the order of the lower Court be set aside and that a retrial be ordered." In the reference the District Magistrate stated that, according to the ruling in *Kanguli Sardar v. Bama*

Charan Bhattacharjee (1), he had jurisdiction to submit that case to the High Court under section 438 of the Criminal Procedure Code, to save the time of the High Court, and also forwarded the explanation of the trying Magistrate who denied all the allegations of the petitioner and stated he was justified in giving the accused the benefit of the doubt and acquitting them.

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Babu Jyotish Chandra Hazra (with him *Babu Mahesh Chandra Banerjee*), for the petitioner (complainant). This case originally came by way of reference, and your Lordships ordered notice to be served on the accused to show cause. The question is whether it was competent for the District Magistrate, under section 438 of the Code of Criminal Procedure, to make an order of reference from an order of acquittal. There is nothing in section 438 to preclude the District Magistrate from making such an application. It is the practice to move the District Magistrate first; and if I cannot come direct to your Lordships I must go first to the District Magistrate. The High Court, District Magistrate and Sessions Judge have concurrent jurisdiction under section 435 to entertain applications against orders passed by the lower Courts.

[SANDERSON C. J. We will hear the other side.]

Babu Hira Lal Sanyal, for the accused, showed cause. This Rule was obtained by a private complainant, and therefore proceedings cannot come before your Lordships by way of an appeal under section 417 of the Code of Criminal Procedure; this is to be made by the Public Prosecutor, and your Lordships have consistently discouraged applications for revision by private persons in the case of an

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acquittal: see Jenkins C. J.'s observations in *Faujdar Thakur v. Kasi Chowdhury* (1). I submit that applications for revision by private persons against orders of acquittal should be discouraged, as the Legislature has advisedly restricted the right of appeal against acquittals to the Local Government. I don't dispute your Lordships' power to interfere, and it ought not to be exercised unless it is in the interest of public justice.

[SANDERSON C.J. This is not an application by a private person but sent to us by a public servant.]

It must be in the interest of public justice. The complaint is by a private person and is therefore compoundable. The trial lasted from November to March. The judgment is very elaborate and discusses all the evidence. No doubt it is open to another Magistrate to form another opinion on the evidence. It is not a wrong decision arrived at by a perverse trial.

[SANDERSON C.J. Does it not in effect follow that this case has never had a proper trial at all?]

Granting that there has not been a proper trial, still it being an order of acquittal, is it in the interest of public justice to set it aside?

[RICHARDSON J. If there has been a fair trial we ought not to interfere simply because we come to a different opinion.]

Although your Lordships have power to interfere in cases of acquittal, yet the decisions all show that your Lordships will interfere only on the ground of public interest. On the facts and findings, it will appear that the accused has been fairly tried.

[SANDERSON C.J. You can deal with each point taken by the District Magistrate, and show that the Court of first instance can be supported.]

The motive for assault has been omitted by the District Magistrate. On evidence it transpired that complainant and accused have been on terms of enmity, and the man to be kept out of possession by the accused was a near relative of the complainant, and was it likely that accused would go to complainant for help under such circumstances, and on his refusal assault him?

[SANDERSON C.J. We can only ascertain if it was a mistake by seeing the evidence.]

Whether a certain witness has deposed to truth is a matter of opinion. There are very material discrepancies in the story of the twelve prosecution witnesses.

[SANDERSON C.J. The District Magistrate says there is none and has made some strong remarks against the trying Magistrate.]

The doctor says he does not believe the injuries to be fatal as stated by his *locum tenens*. But Radhika, with whom the quarrel originated, states another story with regard to this log of wood.

[RICHARDSON J. What is the period of limitation for appeals by the Local Government?]

Six months. The date of acquittal is 9th March 1916. In all the reported decisions in case of reference from acquittal the papers were returned to the District Magistrate with a request to place them before the Local Government: *In re Sheikh Amin-uddin* (1).

[SANDERSON C. J. See *Faujdar Thakur v. Kasi Chowdhury* (2). I am afraid we can't go on.]

It is open to your Lordships to direct the papers to be placed before the Legal Remembrancer.

(1) (1902) I. L. R. 24 All. 346.

(2) (1914) I. L. R. 42 Calc. 612 ;
19 C. W. N. 184.

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[SANDERSON C.J. We ought not to do so without going through the evidence.]

Though in revision your Lordships often go into the evidence, your Lordships may only direct the papers to be placed before the Legal Remembrancer. It is not in all cases that he advises an appeal.

SANDERSON C.J. AND RICHARDSON J. In this case the Magistrate who tried the case acquitted the accused. Then the matter was brought before the District Magistrate who investigated it, examined the evidence, and after such examination referred the matter to the High Court under section 438 of the Criminal Procedure Code; and, he came to the conclusion that the acquittal of the accused was wrong. The grounds of his opinion are summed up in two sentences towards the end of his reference. "The Magistrate has taken a grossly biased and distorted view of the case. His judgment shows that he did not honestly and impartially apply his mind to the actual evidence before him."

There is no doubt about the jurisdiction of this Court, either upon an application of a private individual, or when the case is referred to this Court by a learned Magistrate, that this Court can interfere by way of revision. That has been quite clearly decided in the case to which our attention has been drawn more than once recently—the case of *Faujdar Thakur v. Kasi Chowdhury* (1). I think the headnote correctly summarises the judgment. It runs thus, "the High Court has jurisdiction under section 439 of the Criminal Procedure Code to interfere in revision with an acquittal but it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice."

(1) (1914) I. L. R. 42 Calc. 612; 19 C. W. N. 134.

Now, it is to be remembered that where there is an acquittal the Local Government, if it is so advised and thinks right so to do, can proceed under section 417 of the Criminal Procedure Code, which says: "The Local Government may direct the Public Prosecutor to present an appeal to the High Court from an Original or Appellate Order of acquittal passed by any Court other than a High Court." So that there is nothing to stop or prevent a decision, which involves an acquittal, being brought before the High Court in a proper case on appeal. The Legislature with respect to an appeal from an acquittal thought it advisable that it should only be done by or through the Local Government.

Now, in this case the District Magistrate having expressed the opinion that the Magistrate had taken a grossly biased and distorted view of the case and did not honestly and impartially apply his mind to the actual evidence before him, this Court, in our judgment, ought not to interfere in revision unless it has satisfied itself that that opinion of the District Magistrate is a correct one. It would not be right for this Court to take the expression of opinion of the District Magistrate and to rely upon that opinion without satisfying itself, upon the evidence and upon the conduct of the proceedings generally, that the District Magistrate's opinion was right. What does that involve? That involves that this Court should go practically through the whole of the evidence from start to finish because one of the grounds in the District Magistrate's judgment is this: he says that the prosecution case proved a consistent story without any discrepancies of importance. That is one of the main grounds upon which he relied. How can we tell whether that opinion is right without reading the whole of the evidence given on the part of the prose-

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cution? And, the result would be that in effect we should be hearing an appeal, or at all events, hearing an application to admit an appeal at the instance of a private individual without the intervention of the Local Government: and, therefore, we are both of opinion that in this case we ought not to interfere in revision on the ground that we cannot do so without practically hearing the case as an appeal. I think it is inadvisable to lay down any general rule unless it is absolutely necessary. We both desire to limit our judgment to this particular case endorsing and emphasizing the fact that this Court has, without doubt, jurisdiction to intervene in revision in a proper case. We do not wish to say anything that would throw the slightest doubt upon that point. All that we say is that inasmuch as we should have to investigate the whole of the facts before we could come to the conclusion whether we ought to interfere in revision, in this case, we think we ought not to interfere; and we feel no anxiety, because there is a right of appeal, if the Local Government thinks it advisable so to appeal, inasmuch as the time for appealing has not yet expired. If the learned District Magistrate thinks it right, there is nothing to prevent him from placing the materials which are available to him before the Legal Remembrancer and from asking him to advise the Local Government whether there ought to be an appeal in this case. If the Local Government thinks that there ought to be an appeal, the matter will come before us by way of appeal, when it will be right and proper, at the instance of the Local Government, to investigate, under section 417 of the Criminal Procedure Code, all the facts by way of appeal.

For these reasons, we think, we ought not to interfere by way of revision.

G. S.

Rule discharged.

CRIMINAL REVISION.

Before Sanderson C.J. and Smither J.

CHANDRA KUMAR GHOSE

v.

MAHENDRA KUMAR GHOSE.*

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Aug. 16.

*Local investigation—Proper mode of conducting local investigations—
Practice.*

Great care ought to be taken by a Magistrate who holds a local investigation to see that he is not approached by an outsider and that he does not allow his mind to be affected by outside matters.

The proper thing for him to do is to be attended by a representative of either side for the purpose of identifying the points which are material in the case on the one side or the other ; and he ought not to allow himself to enter into general conversation with the people of the neighbourhood about the case.

RULE obtained by Chandra Kumar Ghose (accused).

The petitioner had purchased certain shares in three tanks (with certain pathways leading to them) from a co-sharer of the opposite party and had been using the said pathways for going to the said tanks, but for some time the opposite party had tried to put obstacles in his way. On the 24th November 1915, the opposite party lodged a complaint against the petitioner, under section 426 of the Penal Code, for cutting down certain fruit trees, and at the instance of the complainant the trying Magistrate went to inspect the place personally, on 23rd March 1916, and based his judgment on materials obtained by the said local

*Criminal Revision No. 730 of 1916, against the order of A. H. Clayton, District Magistrate of Chittagong, dated May 2, 1916, confirming the order of Aman Ali, an Honorary Magistrate of Chittagong, dated April 3, 1916.

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inspection, when the Magistrate had indiscriminately talked to every one present. The petitioner had no chance of knowing what these materials were as the Magistrate did not take any notes. The petitioner on being convicted appealed to the District Magistrate of Chittagong, but the appeal was dismissed on 2nd May 1916. The petitioner, thereupon, moved the High Court.

Mr. J. M. Sen (with him *Babu Tarakeswar Nath Mitra*), for the petitioner. The conviction is under s. 426 of the Penal Code for cutting down trees. My objection is based on the ground that the (Honorary) Magistrate went to the locality, and had a talk with many persons including the complainant and accused's pleader without recording any notes thereof, and based his judgment on impressions obtained thereby. It does not matter that there may be other evidence besides this.

[*Babu Dasarathi Sanyal*. I appear for the opposite party.]

I object to the complainant appearing as the Rule was only on the District Magistrate.

Babu Dasarathi Sanyal, for the complainant. It has always been the practice of this Court to issue a Rule on the complainant when compensation has to be awarded and so the Rule should have been served on me.

[SANDERSON C.J. Yes, the Rule should have been served on you. Have you instructions?]

Yes. I have filed my *vakalatnama*, and I submit that the affidavit is vague being "true to my information and belief". The matter went to the Appellate Court which, on the evidence on the record, came to the same finding and therefore this order ought not to be disturbed. Both the necessary elements

constituting mischief have been found on the evidence by the Appellate Court.

SANDERSON C.J. In this case we think that the Rule should be made absolute.

It is a small case—the damage that was done was small; the fine that was imposed was small, and the compensation that was awarded was small—, and if it had not been for the fact that my learned brother and I, when we granted the Rule, thought that a question of principle is involved, we certainly would not have granted it. But inasmuch as there was an allegation that the Magistrate who tried the case had thought it right at the invitation of both parties to go and make a local inspection as to whether the land upon which the fruit trees were growing was outside the accused's land, or within the accused's land and when he got there, he had a sort of indiscriminate talk with everybody who happened to be present which might or might not have affected his judgment in the case, we issued the Rule. The Magistrate in his explanation says "I had talks with many persons including parties and their pleaders and muktears." But he says that he did not take any notes, because he was not allowed to make any notes on the spot, as one of the pleaders gave him to understand that the case would be surely compromised.

We do not think that that is the proper way of trying a case. If it is necessary to have a local investigation, great care ought to be taken by the Magistrate who holds the local investigation to see that he is not approached by an outsider and that he does not allow his mind to be affected by outside matters. The proper thing for him to do is to be attended by a representative of either side for the purpose of identifying the points which are material in the case on the one side

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and the other, and he ought not to allow himself to enter into general conversation with the people of the neighbourhood about the case. It is quite true, as the learned pleader pointed out, that this case went on appeal to the superior tribunal and that tribunal came to the same decision as the Court of first instance. But the Court of first instance came to the conclusion upon an important point in the case, which was a question of fact, after it had held this local inquiry: and, when the main question in the case is a question of fact, the Appellate Court must be naturally influenced to some extent by the finding of the first Court upon the question of fact. It is impossible for us to say that the Appellate Court was not influenced by the finding of the first Court upon the question of fact, and if the finding of the first Court was vitiated, then it may be that, having regard to the circumstances of this case, the finding of the second Court was also vitiated. For these reasons, it is safer to make this Rule absolute and direct that the case be retried, unless the parties put their heads together and settle the dispute. Really in a case like this, where the parties are related to one another and where the matter is such a small one, it is a great pity that further expenses of litigation should be incurred.

SMITHER J. I agree.

G. S.

Rule absolute.

CIVIL RULE.

Before Mookerjee and Cuming J.J.

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MANMATHA NATH MITTER

Aug. 28

v.

DISTRICT JUDGE, 24-PARGANAS.*

Sale for Arrears of Rent—Purchase of putni—Opposition to purchaser's possession—Application for proclamation—The District Judge or the Collector, the proper authority to issue proclamation—Rent Recovery (Under-Tenures) Act (Beng. VIII of 1865), s. 3—Repealing Act (XVI of 1874)—Regulations VIII of 1819, ss. 8, 9, 15 (2 ; I of 1820 and VII of 1832, s. 16.

Clause (2) of section 15 of Regulation VIII of 1819 has not been affected by s. 3 of Beng. Act VIII of 1865.

Proceedings taken to annul the sale of certain *putni* lands sold for arrears of rent having terminated in favour of the purchaser and the sale having become final and conclusive, the purchaser in attempting to realise the rents from the cultivators of the lands comprised in the tenure purchased by him was opposed in his attempt by some of the intermediate holders who claimed interest between the late *putnidar* and the cultivators. Thereupon, he applied to the District Judge to issue a proclamation under s. 15 of the Putni Regulation VIII of 1819. The District Judge returned the application and directed that it should be made to the Collector who was the proper authority to issue the proclamation.

Held, that the view taken by the District Judge was erroneous and that he had failed to exercise the jurisdiction still vested in him by law under clause 2 of section 15 of the Putni Regulation VIII of 1819.

RULE obtained on behalf of Manmatha Nath Mitter, the petitioner.

One Manmatha Nath Mitter was the proprietor of estate No. 93 of the 24-Parganas Collectorate and under him was the *putni* of Salgaria Jugdia. On the

* Civil Rule No. 694 of 1916, against the order of H. P. Duval, District Judge of 24-Parganas, dated Aug. 21, 1916.

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16th May, 1910, at an *astami* sale, held for arrears of rent, Manmatha Nath Mitter purchased the said *putni*. The sale having become final and conclusive, the purchaser through his officers went to realise the rents from the cultivators of the holdings purchased by him, but was unable to realise such rents on account of the opposition of some of the intermediate holders who claimed interest between the late *putni-dar* and the cultivators. On the 10th August, 1916, the purchaser applied to the District Magistrate of the 24-Parganas for the issue of a proclamation under s. 15 of the Putni Regulation VIII of 1819, but the said District Judge returned the application to the purchaser the following day and ordered that it should be presented to the Collector, who, he held, was the authority who would issue the proclamation. Thereupon, the purchaser applied to the High Court for a Rule on the District Judge of the 24-Parganas to set aside this order.

Babu Narendra Chandra Bose, for the petitioner, referred to the Putni Regulation VIII of 1819, to the Rent Recovery (Under-Tenure) Act VIII of 1865 and to Regulations I of 1820 and VII of 1832, and submitted that the District Judge had erred in refusing to issue the proclamation and directing that the petitioner's application should be presented to the Collector. The District Judge was the proper authority to deal with this application.

The Senior Government Pleader (Babu Ram Charan Mitra), for the District Judge, submitted that he was inclined to take the same view.

MOOKERJEE AND CUMING JJ. This Rule raises an important question of first impression as to the true effect of section 3 of Beng. Act VIII of 1865, upon the

second clause of section 15 of Regulation VIII of 1819. The clause in question describes the procedure to be followed in case of opposition to the new purchaser of the *putni*, when he proceeds to take possession of the land covered by his purchase. The clause lays down that if the late incumbent himself or the holders of the tenures or assignments derived from the late incumbent and intermediate between him and the actual cultivators shall attempt to offer opposition or to interfere with the collections of the new purchaser from the land composing his purchase, the latter shall be at liberty to apply immediately to the *Civil Court* for the aid of the public officers in obtaining possession of his rights. Section 3 of Beng. Act VIII of 1865 provides that the sale for the recovery of arrears of rent of *putni taluks* and other saleable under-tenures of the nature defined in clause (2) of section 8 of Regulation VIII of 1819 shall be conducted by the Collector of Land Revenue in whose jurisdiction, as defined by Act VI of 1853, the lands lie, and all acts *preparatory to or connected with* the sale of such under-tenures as aforesaid, which by Regulation VIII of 1819 and Regulation I of 1820 the Judge is required to perform shall be performed by the said Collector. The question thus arises, whether the effect of section 3 is to make it obligatory upon the purchaser, when he seeks to proceed under the second clause of section 15 of the Regulation, to apply, not to the District Judge but to the Collector.

The answer to the question in controversy depends upon the true meaning of the expression "*acts preparatory to or connected with the sale*" in section 3 of Beng. Act VIII of 1865. Instances of acts preparatory to or connected with the sale were contained in sections 8 and 9 of the Regulation as originally framed. Section 8 required the zemindar, when he desired to sell

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a *putni* for arrears of rent, to present a petition to the Civil Court of the District and a similar one to the Collector. Section 9 contained a provision that the sale should be made by the Registrar of the Civil Court or, in his absence, by the person in charge of the office of Judge or of Magistrate of the District. These were clearly acts preparatory to or connected with the sale, and the effect of section 3 was to render these provisions nugatory and to transfer the functions to the Collector. Now, can it be reasonably maintained in the case before us, that what the petitioner asks the District Judge to do is an act connected with the sale? We are of opinion that the question should be answered in the negative. The sale took place on the 16th May, 1910. Proceedings were taken to annul the sale and have terminated in favour of the purchaser. The sale has consequently become for all purposes final and conclusive. The purchaser now alleges that he is resisted in his attempt to take possession of the lands comprised in the tenure purchased by him. Can it be said, when he seeks the assistance of the District Judge under the second clause of section 15 of the Regulation, that the act to be performed is connected with the sale? Clearly not. It is an act subsequent to the sale, an act which can be performed only on the basis of a valid and concluded sale, no longer liable to be impeached. We must hold accordingly that clause (2) of section 15 of the Regulation has not been affected by section 3 of Beng. Act VIII of 1865. The view we take is confirmed by two circumstances. In the first place, Beng. Act VIII of 1865, as is explained in the preamble, was enacted because "doubts have arisen in consequence of the repeal of section 16 of Regulation VII of 1832 as to the authority by whom *putni taluks* and other saleable under-tenures of the nature defined in clause (1) of section 8 of Regulation

VIII of 1819 are to be sold for arrears of rent due to the proprietor on account thereof." There is no indication here that the Legislature intended that any alteration should be effected in the second clause of section 15. In the second place, "that the Legislature had no such intention is conclusively proved by the provisions of Act XVI of 1874. That Act was passed for the purpose of repealing certain obsolete enactments, because, as explained in the preamble, "the enactments mentioned in the schedule to the Act had ceased to be in force otherwise than by express and specific repeal." In the schedule we find that certain expressions in sections 8 and 9 of the Putni Regulation which had become obsolete by reason of the provisions of section 3 of Beng. Act VIII of 1865, are expressly repealed. But clause (2) of section 15 is left untouched. If the Legislature had thought in 1874 that the provisions of clause (2) of section 15 had been affected by section 3 of Beng. Act VIII of 1865, no doubt that section also would have been suitably altered.

On these grounds, we hold that the view taken by the District Judge is erroneous and that he has failed to exercise the jurisdiction still vested in him by law, that is, under clause (2) of section 15 of the Putni Regulation. The Rule is made absolute and the order of the District Judge is set aside; the petition will be transmitted to the District Judge in order that he may take the necessary steps thereon in accordance with law.

O. M.

Rule absolute.

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APPELLATE CIVIL.

Before N. R. Chatterjea and Sheepshanks JJ.

1916

Aug. 30.

NARAYANI

v.

NABIN CHANDRA CHAUDHURI.*

Occupancy Holding—Transferability—Attachment—Objection of raiyats—Consent of landlords.

A non-transferable occupancy holding or a part of it cannot be sold in execution of a decree for money obtained against the raiyat when the raiyat objects to the sale on the ground of non-transferability, even if the landlords give their consent to the sale.

The above rule does not, as expressly laid down by the Full Bench in *Dayamayi v. Ananda Mohan Roy Chaudhuri* (1), apply to a sale held in execution of a decree founded on a mortgage or charge voluntarily made by the raiyat.

Dayamayi v. Ananda Mohan Roy Chaudhuri (1) followed.

Badrannessa Choudhrani v. Alam Gazi (2) referred to.

Ananda Das v. Rutnakar Panda (3), *Shakaruddin Choudhry v. Rani Hemangini Dasi* (4) commented on.

SECOND APPEAL by the judgment-debtor, Narayani Dassya.

The facts are shortly these. Certain raiyati holdings were, in the course of proceedings in execution of a money-decree, attached by the decree-holder. With reference to some of the holdings, he obtained the consent of the entire body of landlords to the attachment and sale. As to other holdings, he obtained the consent of those landlords having a 10

* Appeal from Order, No. 412 of 1915, against the order of S. E. Stinton, District Judge of Chittagong, dated May 17, 1915, affirming the order of S. C. De, Munsif of Patya, dated Dec. 23, 1914.

(1) (1914) I. L. R. 42 Cal. 172 ; (2) (1915) 19 C. W. N. 814.

18 C. W. N. 971.

(3) (1903) 7 C. W. N. 572.

(4) (1911) 16 C. W. N. 420.

annas 8 pies share. The judgment-debtor objected to the attachment and sale on the ground that the holdings were not transferable.

The Court of first instance found the holdings to be non-transferable. Accepting this finding, the lower Appellate Court overruled the foregoing objection of the judgment-debtor on the ground that "a non-transferable holding may of course be attached with the consent of the landlords and in the case of fractional landlords to the extent of their share," and dismissed the appeal.

From this decision the judgment-debtor preferred this appeal to the High Court.

Babu Kshitish Chandra Sen, for the appellant.

Babu Jogesh Chandra Roy and *Babu Chandra Shekhar Sen*, for the respondent.

Cur. adv. vult.

CHATTERJEA AND SHEEPHANKS JJ. This appeal arises out of proceedings in execution of a decree. The decree-holder respondent in execution of a decree for money attached certain raiyati holdings belonging to the judgment-debtor. He obtained the consent of the entire body of landlords to the attachment and sale of some of the holdings, and with regard to some others he obtained the consent of the landlords representing a 10 annas 8 pies share. The judgment-debtor objected to the attachment and sale on the ground that they are not transferable. The holdings have been found to be non-transferable, but the Court of Appeal below has overruled the objection holding that a "non-transferable holding may of course be attached with the consent of the landlords and in the case of fractionable landlords to the extent of their share." The judgment-debtor has appealed to this Court.

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Now, the Full Bench in the case of *Dayamayi Dasi v. Ananda Mohan Roy Chaudhuri* (1) have laid down that an involuntary transfer, *i.e.*, a sale in execution of a money-decree, of the whole or part of an occupancy holding apart from custom or local usage, is operative against the raiyat where the raiyat with knowledge fails or omits to have the sale set aside. As pointed out in *Badrannessa Choudhrani v. Alam Gazi* (2), the question of the omission or failure to set aside the sale with knowledge thereof becomes material only where the sale is invalid and the raiyat has a right to object to it. The Full Bench decision therefore by implication holds that the raiyat is entitled to have a sale of the holding in execution of a money-decree set aside after it takes place, and that the holding cannot be sold in execution of such a decree where the raiyat objects to the sale before it takes place.

Before the Full Bench decision it was held that a sale in execution of a money-decree of an occupancy holding is valid and effectual if the sale is held with the consent of the landlord [see *Ananda Das v. Rutnakar Panda* (3)] and that even a share of a holding can be sold with the consent of the co-sharer landlords to the extent of their share [see *Shakaruddin Choudhry v. Rani Hemangini Dasi* (4)]. But the view taken in those cases can no longer be maintained having regard to the decision of the Full Bench, which, as stated above, impliedly lays down that a sale of an occupancy holding cannot be held in execution of a money-decree if the tenant objects to the sale. It is true the decree-holder has obtained the consent of the landlords. But in the case of a non-transferable holding, as the raiyat cannot confer a title upon

(1) (1914) I. L. R. 42 Calc. 172 ; (2) (1915) 19 C. W. N. 814.

18 C. W. N. 971.

(3) (1903) 7 C. W. N. 572.

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the purchaser without the consent of the landlord, so the landlord alone by his own act and without the concurrence of the raiyat cannot create a title in the purchaser. The two must concur in order that the transfer may be valid. Having regard to the view taken by the Full Bench as to involuntary transfers, we are unable to hold that the entire holding or a part of it can be sold in execution of a money-decree if the raiyat objects to the sale, even if the landlords give their consent to such sale. It is needless to point out that this does not apply to a sale held in execution of a decree founded on a mortgage or charge voluntarily made by the raiyat in which case the transfer though involuntary is operative against the raiyat as expressly laid down by the Full Bench.

The appeal must accordingly be allowed, and the orders of the Courts below set aside. We make no order as to costs.

L. R.

Appeal allowed.

SPECIAL BENCH.

Before Sanderson C.J., Chaudhuri and Newbould JJ.

*In the matter of BONOMALLY GUPTA.**

1916

Aug. 31.

Jury, trial by—Jurymen, communication with by stranger, and by Clerk of the Crown—Police Officer's presence near jury room—Communication of deliberation by jurymen before or after case is over—Habeas corpus, writ of—Jurisdiction—Criminal Procedure Code (Act V of 1898), s. 491—Letters Patent, 1865, cls. 25 and 26—Trial, vitiation of—Practice.

Per CURIAM : It is highly undesirable that a juror should have any communication with anybody who is not a juryman upon the subject-matter of the trial. But the mere fact that one of them is addressed by a stranger, to whom apparently the juryman makes no reply or whose remarks

* Application in Original Criminal.

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the juryman does not look upon as worthy of consideration, cannot have the effect of invalidating a trial.

A mere casual question (which evidently had nothing whatever to do with the case), by a juryman to a Police officer in charge of the jury, it not even being alleged that the Police officer spoke in reply to the juryman, cannot be any ground for invalidating the trial.

Though it is undesirable that a police constable should be stationed in any position in which he can hear the deliberations of the jurymen, still if the presence of the constable has not in any way affected the deliberations of the jurors, either by interfering with or inconveniencing them, the accused is not in any way prejudiced.

The learned Judge was only doing his duty when he twice sent the Clerk of the Crown to the jury and asked them (in accordance with the practice in the High Court) if he could give them further assistance on any of the many points which were for their consideration, there being no less than 17 charges.

The jury are ill-advised to talk with anybody except their fellow-jurymen about the case. Whether the case is still going on or after the case is over, the jury would be ill-advised to have any communication with anybody except their fellow-jurymen as to what happened in the jury room.

The Queen v. Murphy (1) referred to.

Per CHAUDHURI J. It is well established that a writ of *habeas corpus* is not granted to persons convicted or in execution under legal process, including persons in execution of a legal sentence after conviction on indictment in the usual course.

Ex parte Newton (2) referred to.

When the law does not allow an appeal, the accused cannot have one indirectly in this way. When there has been a miscarriage of justice, as alleged in this case, the proper course is to carry the matter to the Crown for remedy.

Queen-Empress v. C. P. Fox (3) referred to.

APPLICATION by Bonomally Gupta, the accused (petitioner).

The petitioner was tried at the High Court Sessions presided over by Mr. Justice Chitty who, agreeing with the majority of the jury, convicted him on 17

(1) (1869) L. R. 2 P. C. Ap. Ca. 535. (2) (1855) 24 L. J., C. P., 148.

(3) (1885) I. L. R. 10 Bom. 176.

charges of forgery, etc., and passed a sentence of imprisonment.

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Thereafter, under s. 491 of the Code of Criminal Procedure, the accused applied to Mr. Justice Chitty, for the issue of a writ of *habeas corpus* on the Superintendent of the Alipore Jail. This application having been refused, the accused moved the Bench presided over by the Chief Justice, and his Lordship formed this Bench to hear the application, which was made really by way of appeal.

Mr. N. N. Sircar, for the petitioner.

[The arguments appear sufficiently from the judgments.]

SANDERSON C.J. This matter came before the Court yesterday by way of an appeal from an order made by my learned brother Mr. Justice Chitty. The application made to him was that a Rule might issue to the officer in charge of the Alipore Central Jail, calling upon him to show cause why the petitioner should not be set at liberty or brought before the Court to be dealt with according to law.

The petitioner was tried at the sessions, convicted by a majority of the jury, and sentenced to a term of imprisonment.

The learned Judge refused the application and it was from that refusal that the application, which was really by way of appeal, was made to us yesterday.

The ground upon which the application was made was that the petitioner was illegally and improperly detained at the Alipore Central Jail; and, we are asked to exercise the jurisdiction which is vested in us by section 491 of the Code of Criminal Procedure.

The first question raised was whether this Court had jurisdiction in the circumstances of this case to issue a Rule, in view of the fact that the petitioner had

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been tried before a Judge and a jury, that the jury had given a verdict convicting him, and the learned Judge had passed a sentence upon him in accordance with law. It was argued by Mr Sircar, who appeared for the petitioner that this Court had jurisdiction under that section to issue a Rule under the circumstances of the case. The point was put to him whether this application was not in effect really an appeal from the decision of the Court by which the petitioner was convicted, and Mr. Sircar agreed that in effect it was. The point then arose whether, that being so, this Court had jurisdiction in view of clauses 25 and 26 of the Letters Patent, whereby it is provided that "there shall be no appeal from any sentence or order passed or made in any criminal trial before the Courts of Original Criminal Jurisdiction which may be constituted by one or more Judges of the said High Court," with the exceptions which are specifically mentioned in clauses 25 and 26.

This raises a point of great importance, and I should not like to express any definite opinion upon it until I have the advantage of hearing the point more fully argued than it was yesterday. I do not intend to express any definite opinion upon it on this occasion. I desire to make it clear that no words of mine should be taken to express an opinion which may in any way cut down, curtail or diminish the powers of this Court in any shape or form. I only mention the point to show that it did not escape my mind. The reason why I do not intend to express any opinion is that, upon the facts, I am clear that even if we had jurisdiction to interfere in this case, we ought not to do so.

Now, the facts upon which this application was made may be divided really into three classes. It is first alleged that after counsel for the defence had

finished his address, the jury came out of the Court and some of them waited in the jurors' waiting room where there were some strangers. One of such strangers said that the case was suspicious and complicated or words to a similar effect. It is to be noted that this was after the speech of counsel for the defence and, I presume, before the speech of counsel for the prosecution in reply if there was one, at all events before the learned Judge charged the jury and before they were directed by him retire to consider their verdict. It is highly undesirable that a juror in any case, much more so in a criminal case, should have any communication with anybody who is not a juryman upon the subject-matter of the trial. But the mere fact that when the jurors are either in a waiting room or perhaps on the way to the Court or out of the Court, one of them is addressed by a stranger to whom apparently the juryman makes no reply or whose remarks the juryman does not look upon as worthy of consideration, cannot have the effect of invalidating a trial.

The second ground on which the application was based was that after the Judge's charge, the jury were locked up in the jury room and a Police officer was present in the room throughout and heard their deliberations. The juryman, who had given the information in this respect, went on to say that there was no conversation with the Police officer and that only one question was put to the Police officer by one of the European jurors. It is to be noted that the juryman does not even go on to say that the Police officer gave any answer to that question, and Mr. Sircar, learned counsel for the petitioner, admitted that the question which was addressed to the policeman by one of the jurors was in all probability a question of no importance—it might have been a mere casual question which had nothing whatever to do with this case.

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It was not even alleged that the Police officer spoke in reply to the jurymen. The only allegation was that one of the jurymen passed a casual remark to the Police officer who was in charge. Now, in my judgment that can not be said to be any ground for invalidating the trial. The section which deals with this matter is section 300 of the Code of Criminal Procedure. It says, "In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict. Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury." There is no evidence here that the Police officer who was in charge of the jury spoke or held any communication with any of the jurors.

With regard to the presence of the policeman in the jury room, I have made enquiries and I ascertain that it is in accordance with the practice observed in this Court that the Police officer who is put in charge of the jury generally goes into the corridor near the jury room which is so situated that it opens on the corridor on one side. There is a door which leads from the Court and that door is locked; the Police officer is generally stationed in the corridor, with the windows of the jury room opening on that corridor. In my judgment, it is undesirable that the Police constable should be stationed in any position in which he can hear the deliberations of the jurymen. As far as I am concerned, I shall take steps in future that the Police constable should be stationed in such a place that he cannot hear any part of the deliberations of the jurors.

But in this case it is to be noted that it is not suggested that the fact of the Police constable being present has in any way affected the deliberations of the jurors, that he in any way interfered with them,

or that the jurymen had felt inconvenience by his presence. No suggestion of that kind was made in the affidavit. I summarize it by saying that there is no suggestion in the affidavit that the accused was in any way prejudiced by the presence of the constable. When I say that it is undesirable that a Police officer should be present in the jury room, I am looking at the question mainly from the point of view of the jurymen themselves and I say that it is undesirable that anybody should be in a position where it is possible for him to know the form the deliberations of the jury took, or what view any particular juror expressed about the matter.

So far as regards the second ground, I can see no reason for interference.

The third ground is that when Mr. Moses, who was then acting as the Clerk of the Crown, entered the room where the jury had been locked up, he used words which were not exactly remembered by the jurymen who gave the information, but the purport of which certainly was that they ought to have come to a decision by that time, and that the jurymen understood that they were required to expedite matters and that the complaint was that they had enough time already. I said yesterday that I would communicate with the learned Judge and ascertain what actually took place. I anticipated that he had sent the Clerk of the Crown, as is frequently done in a case like this which was a heavy case and in which the jury had taken considerable time to consider their verdict, to enquire if he could give them any further assistance upon any point, and I find my anticipations are entirely borne out by what the learned Judge has said. He has said, "I finished my summing up somewhat late in the evening, and the jury retired to consider their verdict. The facts of the case were

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not complicated, but there were no less than 17 charges, *i.e.*, forgery, using as genuine a forged document, cheating and abetment of those offences, in respect of three documents, and a sum of Rs. 960. When the jury had been absent for about an hour and 10 or 15 minutes, I was anxious as to whether they thoroughly understood my direction about the various charges. I accordingly asked the Clerk of the Crown to go to them and enquire if they wanted further assistance. He returned with a somewhat indefinite reply that they were still considering their verdict or words to that effect. I then requested him to go to them again and call them into Court, which he did. I too returned to the Court at the same time and questioned the foreman. From his replies I gathered that they had already dealt with 12 charges and had 5 left to consider. He did not give me to understand that they required any further direction or assistance from the Court. They accordingly again retired; and after a lapse of 15 or 20 minutes returned to Court and delivered their verdict on each of the 17 charges. I accepted the verdict of the majority (6 to 3) and sentenced the accused accordingly. My recollection is that the Clerk of the Crown only spoke to them twice, and though I did not hear what he said being in my chambers, I had no reason to suppose that he did more than deliver my message on each occasion." I have asked the Clerk of the Crown if he agrees with what the learned Judge has said and he said that that was substantially so. I also asked him whether he carried out the learned Judge's directions and he said he did: I then asked him whether he did anything more than what the learned Judge had asked him to do. He said he did absolutely nothing more. Therefore, in my judgment, there was nothing which was contrary to the practice of the Court and propriety. I

consider that in a case like this, which must necessarily be somewhat troublesome in view of the fact that there were no less than 17 charges, the learned Judge was only doing his duty when he sent the Clerk of the Crown to the jury and asked them if he could give them further assistance on any of the many points which were for their consideration. It seems to me that this part of the application is totally misconceived and is based upon allegations which are not in accordance with the facts.

As regards the other part, the learned Judge says "as to the presence of the sergeant in charge of the jury in the jury room I have no personal knowledge. No comment was made upon it at the time, either in this case or in any of the other cases in this last calendar."

In dealing with the question of the Police officer, I ought to have mentioned that the form of the oath a Police officer is required to take is this: "you swear that you shall well and truly keep this jury in a convenient and private place. You shall not allow any one to speak to them neither shall you speak with them unless if they are asked by the Court whether they are agreed upon their verdict. So help you God."

We have only the information which has been laid before us on behalf of the petitioner in this case, and he does not suggest any facts to show that the Police officer did not act in accordance with the oath.

Finally, I draw attention to the fact that the application is based upon information which is alleged to have been given by three of the jurymen to the brother of the petitioner. I think that the jurors are ill-advised to talk with anybody except their fellow-jury-men about the case. Whether the case is still going on or after the case is over, I think the jury

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would be ill-advised to have communication with any body except their fellow-jurymen as to what happens in the jury room; whether the Court ought to listen to allegations made by individual jurors after they have given their verdict in such a case as this, I have considerable doubt. But in order that there should be no suggestion that the accused has not had full hearing and consideration in this case, we have accepted the affidavit which was based upon the statements of these individual jurymen. Upon the question whether we ought to accept the statements of individual jurymen, I would refer to what was said by Sir William Erle, to which my attention has been drawn by my learned brother Mr. Justice Chaudhuri, in the *Queen v. Murphy* (1), the passage to which I refer being at page 549, where he says "There is also the further objection, that the supposed informant had been one of the jurymen and the Courts here have at times expressed a reluctance, which we consider salutary, against receiving the separate statements of any of the individuals who had in combination formed a jury, in order to impeach the verdict." This is in accordance with the expression of opinion given by many learned Judges in the Courts of England. Since the case was argued yesterday, I have had no time to search for the cases myself, but I have no doubt that there can be found in the books expressions of opinion in even stronger language than that used by Sir William Erle in the case to which I have referred. It is a dangerous thing for a Court to rely upon anything except the verdict of the jury, and we might get into serious difficulty if we were to listen to the statements of individual jurymen made to this or that person, after they had performed their duty and delivered their verdict.

(1) (1869) L. R. 2 P. C. Ap. Ca. 535, 549.

However, in order that there might be, as I have said, no suggestion that the accused had not received justice in the case, we admitted the statements and we have considered them. In my judgment, there is no ground in the petition which would justify us in interfering in this case. Therefore, we refuse to grant a Rule and dismiss the appeal.

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CHAUDHURI J. I agree with the judgment just delivered by the learned Chief Justice, and hold that the appeal must be dismissed.

I entertain very great doubt whether section 491 of the Criminal Procedure Code is at all applicable to a case of the character which was put before Mr. Justice Chitty. I am inclined to hold that it is not. The reasons why I do not express myself more definitely are, *firstly*, it is not necessary to do so having regard to the facts of this case; and, *secondly*, because this question was not fully argued before us.

So far as trials in our Original Criminal Jurisdiction are concerned, the right of appeal or revision is limited by the Letters Patent, clauses 25 and 26. Section 491 of the Criminal Procedure Code appears in a chapter headed "directions of the nature of a *habeas corpus*." I think it is well established that a writ of that nature is not granted to persons convicted, or in execution under legal process, including persons in execution of a legal sentence after conviction on indictment in the usual course. It is not granted where the effect of it would be to review the judgment of one of the superior Courts, which might have been reviewed on a writ of error, or where it would falsify the record of a Court which shows jurisdiction on the face of it. I may refer to the case of *Ex parte Newton* (1). In that case upon an indictment charging felony

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committed within the jurisdiction of the Central Criminal Court, a prisoner who had pleaded "not guilty" was tried, convicted and sentenced to imprisonment. After sentence an application was made to the Court for a writ of *habeas corpus* for his discharge, upon an affidavit showing that the offence was not committed within the jurisdiction as alleged. It was held by the learned Judges that the record was an estoppel, and the writ was refused. Jervis C. J. in delivering his judgment said "No doubt, in some respects, this is a case of importance, but no authority has been cited to show that we can entertain the application," "and the reason for no authority having been cited is, most probably, that the point was never before raised, because there is nothing in it." Justice Cresswell held: "if the Court entertained an application of that character it should next be asked to enquire into the truth of any other fact averred upon an indictment and found by the jury, which, after trial, it might be said, had not been proved." The judges agreed that there was no authority to warrant interference by the issue of such a writ. I may also refer to the case of *King v. Suddis* (1). There Lord Kenyon C. J. said, "We are not now sitting as a Court of Error, to review the regularity of their proceedings, nor are we to hunt after possible objections." Justice Grose held, "it is enough that we find such a sentence pronounced by a Court of competent jurisdiction to enquire into the offence, and with power to inflict such a punishment. As to the rest we must therefore presume *omnia rite acta*." Justice Lawrence held, "It is enough that the Court had authority to award such a sentence." The return was, that the party was detained in custody, under the judgment of such a Court, which was the

usual return and sufficient. Justice Le Blanc, in answer to the objection that it did not appear that the party had been charged with the offence of which he had been convicted, said: "It is sufficient for the officer having him in his custody to return to the writ of *habeas corpus* that a Court having a competent jurisdiction had inflicted such a sentence as they had authority to do, and that he holds him in custody under that sentence." When the return states that the party who is alleged to be wrongfully detained is in execution of a sentence on indictment of a criminal charge, the return cannot be controverted. That seems well established in English cases. No case has been cited before us which supports such an application.

As regards irregularity in the proceedings, not discovered till after the verdict, I may refer to the case of *Queen v. Murphy* (1). In that case after conviction and sentence of death passed and judgment entered upon the record, an application was made to the Supreme Court, sitting in Banco, for a Rule for a *venire de novo* on an affidavit which stated that one of the jury had informed the deponent that pending the trial and before the verdict, the jury having adjourned to an hotel had access to newspapers which contained a report of the trial as it proceeded, with comments thereon. The Supreme Court made the Rule absolute, considering that there had been a mistrial, and ordered an entry to be made on the record of the circumstances deposed to, that the judgment on the verdict should be vacated and a fresh trial had. On appeal to Her Majesty in Council, the Judicial Committee held that the order for vacating the judgment and for a *venire de novo* must be reversed. In delivering their Lordships' judgment Sir William

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Erle said: "Their Lordships consider that the present case is in substance an attempt, by the exercise of a discretion, to grant a new trial on the ground that the conviction was considered to be unsatisfactory by reason of some irregularity in the conduct of the trial." "If irregularity occurs in the conduct of a trial, not constituting a ground for treating the verdict as a nullity, the remedy to prevent a failure of justice is by application to the authority with whom rests the discretion either of executing the law or commuting the sentence."

In answer to an observation made by the learned Chief Justice to the effect that after the conclusion of a trial and conviction when there was no appeal or revision allowed in law, the proper authority to remedy a wrong was the Crown, Mr. Sircar said that was "a matter of grace," and the accused could not go up to the Crown as a "matter of right." He relied upon section 491 as giving him the right to question the validity of the conviction. He admitted that he was practically asking for an appeal against the conviction. The law as it stands does not allow an appeal, and the accused cannot have one, indirectly in this way. If there has been a miscarriage of justice, as alleged in this case, the proper course is to carry the matter to the Crown for remedy. In addition to the case above cited, I may also refer to among others *Queen-Empress v. C. P. Fox* (1), in which Sir Charles Sargent, C. J., said, "If an error has been committed in the order which is sought to be reviewed, the proper course will be to apply to the Government, who, if they are convinced that there has been an error, will, no doubt, exercise their prerogative of remitting the sentence which has been passed."

I have explained why I am inclined to hold that this Court has no jurisdiction in a matter of this character, under section 491 of the Criminal Procedure Code. Upon the facts, however, it is not necessary to base my decision upon that view of the law.

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NEWBOULD J. I agree with my Lord the Chief Justice.

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Application refused.

Solicitors for the petitioner : *Bonnerjee & Bonnerjee.*

CRIMINAL REVISION.

Before Teunon and Beachcroft JJ.

ABDUL KARIM

v.

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Nor. 29.

Surety—Grounds of fitness—Pecuniary sufficiency—Inability of control—Discretionary power of the Court on the facts of each case—Propriety of the order—Criminal Procedure Code (Act V of 1898), s. 122.

The question as to the fitness of a surety is one of discretion in each case, and the High Court has only to consider whether the order of the Magistrate is reasonable and proper in the circumstances of the particular case.

Jalil v. Emperor (1), *Jafar Ali Panjalia v. Emperor* (2) and *Emperor v. Asiraddi Mandal* (3) approved.

Ram Pershad v. King-Emperor (4), *Adam Sheikh v. Emperor* (5) and *Rayan Khan v. Emperor* (6) not followed.

* Criminal Revision, No. 1062 of 1916, against the order of K. B. Das Gupta, Fourth Presidency Magistrate of Calcutta, dated June 12, 1916.

(1) (1908) 13 C. W. N. 80.

(4) (1902) 6 C. W. N. 593.

(2) (1910) I. L. R. 37 Calc. 446.

(5) (1908) I. L. R. 35 Calc. 400.

(3) (1914) I. L. R. 41 Calc. 764.

(6) (1916) I. L. R. 43 Calc. 1024

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THE petitioner, who was alleged to be the ring-leader of a gang of dacoits operating in Calcutta and other parts of India, was bound down under s. 110 of the Criminal Procedure Code, by the Fourth Presidency Magistrate, to be of good behaviour for three years with two sureties each in the sum of Rs. 750. The order was confirmed by the High Court.

The petitioner offered several sureties who were rejected by the Magistrate. He thereupon entered into a contract of service with Mr. Ahmad, a Police Court pleader, for three years, agreeing to keep him company constantly during such period. The Magistrate refused the surety by the following order, on the 12th June 1916.

The petitioner is examined. He is a pleader of this Court and a resident of Calcutta, and has known the prisoner, Abdul Karim, only as a hawker of shawls, and a client in one case. He has no other connection with him, and I do not see how he will be able to control him. Abdul Karim comes from up-country, and is a dangerous criminal, so I find the petitioner will not be able to control him. His petition is rejected.

The petitioner then moved the High Court and obtained the present Rule.

Moulvie A. K. Fazlul Huq (with him *Babu Sasadhar Roy*), for the petitioner. The only point for the Magistrate to consider was the pecuniary qualification of the surety. Want of ability to control the accused is not a ground of rejection of the surety: *Ram Pershad v. King-Emperor* (1), *Adam Sheikh v. Emperor* (2), *Rayan Khan v. Emperor* (3).

The Offg. Deputy Legal Remembrancer (Mr. J. Camell), for the Crown. In the case last cited, no reference was made to the rulings in *Jalil v. Emperor* (4) and *Emperor v. Asiraddi Mandal* (5).

(1) (1902) 6 C. W. N. 593.

(3) (1916) I. L. R. 43 Calc. 1024.

(2) (1908) I. L. R. 35 Calc. 400.

(4) (1908) 13 C. W. N. 80.

(5) (1914) I. L. R. 41 Calc. 764.

TEUNON J. This Rule is directed against the order of the Fourth Presidency Magistrate, Calcutta, declining to accept as surety for the good behaviour of the present petitioner a certain Mr. Ahmad. Mr. Ahmad, we are informed, is a pleader practising in the Police Court in Calcutta. It appears that under the provisions of section 118 and section 123 of the Criminal Procedure Code the petitioner has been required to give security for his good behaviour for a period of three years. From the proceedings taken against him we learn that it has been found that he is a member of a large gang of swindlers carrying on operations on a large scale in Chitpore, Cossipore and other parts of Calcutta. It also appears that he is an up-country man. The reason for refusing the proffered security has been said by the Presidency Magistrate in his order to be the inability of the proposed surety to control the petitioner.

Before us it has been contended that inability to control the person required to furnish security is not a sufficient reason for an order rejecting the proffered surety, and that the only matter to be considered is the said surety's pecuniary sufficiency. In support of this proposition we have been referred to a certain number of decisions of this Court, namely, *Ram Pershad v. King-Emperor* (1), *Adam Sheikh v. Emperor* (2), *Rayan Khan v. Emperor* (3). No doubt in those cases support for the contention that has been urged before us is to be found. But in another series of cases decided in this Court, for instance, in the cases of *Jalil v. Emperor* (4), *Jafar Ali Panjalia v. Emperor* (5) and *Emperor v. Asiraddi Mandal* (6), it has been laid down, as indeed the law itself seems

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to say, that the question in every case is one of discretion, and what the Court has to look to is whether, under the circumstances of each particular case, the order rejecting the surety is a reasonable and proper order. In the case of *Rayan Khan v. Emperor* (1), which was one not argued at the Bar, we observe that no reference has been made either to the case of *Jalil v. Emperor* (2), or to the case of *Emperor v. Asiraddi Mandal* (3). With the series of cases beginning with *Jalil v. Emperor* (2), we are in entire agreement, and, therefore, the only thing we have to consider is whether, in the circumstances of this particular case, the order rejecting the proffered surety, Mr. Ahmad, a pleader practising in the Calcutta Police Court, is a reasonable and proper order and, without going further into the matter, we are of opinion that the order rejecting the proffered surety was in this case reasonable and proper. True it has been argued before us that the petitioner has entered into an agreement by which he undertakes to serve the proffered surety in a personal capacity for a period of three years. But that obviously is a contract which cannot be specifically enforced, and we are unable to say how the petitioner is to serve at the surety's house, which we are informed is near College Square, and also be in attendance upon him at the Police Court where he practises. This Rule is, therefore, discharged.

BEACHCROFT J I agree.

Rule discharged.

E. H. M.

(1) (1916) I. L. R. 43 Calc. 1024. (2) (1908) 13 C. W. N. 80.

(3) (1914) I. L. R. 41 Calc. 764.

ORIGINAL CIVIL.

*Before Sanderson C.J. and Chaudhuri J.**In re AN ADVOCATE.**

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June 14.

Barrister—Counsel receiving instructions direct from client—Non-return of fees for professional work not performed—Usage and etiquette of the profession—Duties of Counsel—Nomination of juniors by seniors and of seniors by juniors, practice of—Practice.

The usage of the profession of a Barrister that counsel should take his instructions only from an attorney in respect of any professional work on the Original Side of the High Court, is a most beneficial one from the point of view of the public and the Bar and, though founded upon no rule of law, ought to be maintained.

In a certain suit, counsel accepted a brief containing instructions for him to appear at the trial on behalf of a party and was paid the consultation fee and the fee for attending the trial, which were marked thereon. Counsel attended the consultation and subsequently left Calcutta to attend to an urgent professional call, having previously returned the brief to the attorney, but not the fees :—

Held, that counsel should have returned the whole fee (both for consultation and for attending the trial). It was given to him for the purpose of attending the trial, and the consultation was held with a view to his so doing.

The practice for seniors to name their juniors, or for juniors to nominate their seniors, is contrary to the traditions of the profession and to its best interests, and such a practice ought to be discouraged. It is, however, quite legitimate for a senior to ask a junior to hold a brief for him when he is temporarily unable to attend to a case.

RULE.

This was an application against an Advocate of the High Court brought by one Mr. Chill claiming the return of fees paid by him to the Advocate in connection with legal work which it was alleged was not performed by the Advocate, and charging him with

* Original Civil Jurisdiction.

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unprofessional conduct. Mr. Chill was introduced to the Advocate by one Mrs. Neil, and at the interview Mr. Chill told the Advocate that he had a claim against the Uncovenanted Family Pension Fund, and that he wanted the Advocate to peruse the considerable correspondence, which extended over 10 or 12 years, between himself and the authorities of the Fund, and also other papers and documents in connection therewith, and to advise him with a view to civil proceedings being taken.

On this very heavy file of papers being made over by the petitioner to the Advocate, the latter demanded a fee of Rs. 500 for perusal and opinion, in anticipation of any course he might advise the petitioner to pursue. The petitioner, thereupon, paid the Advocate Rs. 100 on account on that occasion, a further sum of Rs. 100 on or about the day following, and, subsequently, further sums, aggregating a sum less than the stipulated amount of Rs. 500. Thereafter, a brief was sent to the Advocate with a fee of 4 G. Ms. and a separate fee of 3 G. Ms. for consultation, marked thereon. The Advocate attended the consultation but before the case came on for trial, he had to go to Hazaribagh on urgent professional business. Prior to his leaving Calcutta, he returned his brief to the Attorney together with his notes on the case, but not the fees he had been paid. At the trial, the petitioner's case was taken up by another counsel, who conducted the suit for him. Thereafter, the petitioner applied to the High Court for the present Rule. In answer to the petitioner's application, the Advocate claimed that the fee for perusing the documents and giving his opinion to the petitioner prior to the institution of the suit, and the fee for consultation had been properly earned by him, but in regard to the fee of 4 G. Ms. on the brief, he had consented to refund the same.

The Petitioner in person, in support of the Rule.

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Mr. Eardley Norton, Mr. H. D. Bose, Mr. S. K. Mullick and Mr. A. Rasul. for the Advocate, showed cause.

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SANDERSON C.J. In this case we have considered the complaints which have been made against the Advocate. After reading the affidavits we thought it necessary that we should further enquire into the matter, more especially with regard to two questions, namely, the circumstances under which the work was originally undertaken by the Advocate, and the alleged non-return of his fees when he was unable to conduct the case in Court. Accordingly, we held the further enquiry yesterday.

With regard to the first question, we are of opinion that there is no need for any further action by the Court.

I take the account which is given by the Advocate himself in his affidavit, paragraph 2; after setting out that the petitioner was introduced to him at his house by one Mrs. Neil, and pointing out that the petitioner told him that he had a claim against the Uncovenanted Service Family Pension Fund, he goes on to say that: "He further told me that considerable correspondence extending over 10 or 12 years had taken place with the authorities of the said Fund and he requested me to peruse the whole volume of correspondence and other papers and documents in connection with the matter and to advise him how to proceed. That, thereupon, he made over to me a very heavy file of papers and I demanded from the petitioner a fee of Rs. 500 for perusal and opinion in anticipation of any course I might advise him to pursue, whereupon the petitioner paid me Rs. 100 on account on that occasion, and a further sum of Rs. 100 on or about the day

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following.” Further money was paid afterwards, but not amounting to Rs. 500, and it does not affect the point that I am now considering. I think it unfortunate that the Advocate did not follow the well-known custom and ask that he should be properly instructed by an Attorney. The advice of the Advocate was sought with a view to civil proceedings being taken. The custom to which I have referred is well-known, and is stated in Lord Halsbury’s book (The Laws of England, Vol. II, page 389), as follows:—“ The usage and etiquette of the profession of a Barrister require that in all but some exceptional cases counsel should not undertake any professional work as regards which the relation of counsel and client can arise except on the instructions of a solicitor.” That, as we were informed yesterday, will not apply literally to the Appellate Side, where counsel are instructed sometimes either by a vakil or a mukhtear or in some cases by an attorney. “ There is no rule of law to prevent a litigant from instructing counsel directly, or to prevent counsel so instructed from appearing on behalf of a litigant ; but a judicial opinion has been expressed that it is expedient in the interests of suitors and for the satisfactory administration of justice to adhere to the usage which requires that counsel should not accept a brief in a civil suit from anyone but a solicitor. The exact scope of the usage is not very clearly defined, but it extends to all civil contentious business, and to all criminal business except what is known as a ‘dock defence.’ It does not extend to the preparation of a will, to work before Parliamentary Committees, where counsel may appear when instructed by Parliamentary Agents who need not be solicitors, or to inquiries under the Local Government Acts, the Public Health Acts, or the Light Railways Act ; at such inquiries counsel may be instructed by clerks to local authorities

who are not solicitors. A Barrister may advise in non-contentious business without the intervention of a solicitor, though the practice has been stated to be undesirable." The Rule stated in Mr. Belchamber's Book "Practice of the Civil Courts" page 8, to which the learned Advocate-General referred us yesterday, is as follows:—"The usage that counsel should take their instructions only from attorneys is beneficial and, though founded upon no rule of law, ought to be maintained." The learned Advocate-General, when asked whether the course which the Advocate adopted, as set out in paragraph 2 of the Advocate's affidavit to which I have referred could be said to be in accordance with the custom here, said that according to his experience it was not so, and it should not have been done. The abovementioned usage is a most beneficial one from the point of view of the public and the Bar: and, if it had been followed in this case, much of the trouble which has arisen would have been avoided. At the same time, I do not think that in this case the complainant was prejudiced, for though the fee demanded was a large one, namely, Rs. 500 for perusal of the papers and opinion, the full amount was not paid, and it is alleged that there was a large volume of correspondence and other documents which had to be looked into; and, apparently, the Advocate took considerable trouble over the matter.

As regards the second question, it appears that the Advocate accepted the brief marked 7 G. Ms.—4 and 3—containing instructions for him to appear at the trial on behalf of the complainant. Sometime in March 1916, the Advocate alleges, he had to go to Hazaribagh on an urgent professional call, and before he left Calcutta he returned his brief to the attorney with his notes. He did not, however, return his fees. He had had the consultation and he claimed

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to have earned the consultation fee of 3 G. Ms. marked in the brief. In my opinion, he should have returned the whole fee of 7 G. Ms. It was given to him for the purpose of attending the trial, and this consultation was held with a view to his so doing: and if he could not attend the trial, another counsel would have to be briefed and a further consultation with the second counsel would be necessary for which the client would have to pay. Under the advice of his counsel, the Advocate has now offered to return the fee of 7 G. Ms., and I think he should do so.

Copies of certain letters were produced by the attorney. These letters are alleged to have been written by him to the Advocate at Hazaribagh. The Advocate denies having received them and he denies the statements contained therein. I accept his statement. If he had received these letters and if the facts alleged therein were proved, I should have taken a much more serious view of the matter. I think he should have returned his fees when he found he could not attend to the case without being asked so to do: especially, as he must have known that the complainant was not a man in affluent circumstances and that the non-return of the fees might place him in a difficulty. Fortunately, however, another counsel took up the case for Mr. Chill and conducted it for him so that in the end his interests did not suffer. The conduct of the Advocate with regard to this part of the case cannot be regarded with anything but disfavour: but having regard to the circumstances of the case, which I have mentioned, I do not think it necessary for the Court to take any further steps. Consequently, in my opinion, this Rule ought to be discharged.

I wish to add a word about a matter which has nothing to do with this case, but it is a matter of general importance to the profession. It cropped up

during the course of the hearing with reference to a passage in the affidavit of the Advocate in paragraph 11, in which he says "I made over my brief with all the notes I had prepared for my own use to the attorney when I left Calcutta, and I state that I had no hand in the selection of my junior." I happened to pass a remark about that; and, thereupon, one of the learned counsel alleged that it was by no means an unknown or uncommon practice for one counsel to select another counsel to act with him in the case. I should be very sorry to believe that this is so. I do not refer of course to a learned counsel holding a brief for another when he is temporarily unable to attend to a case. That is a very different matter. What was suggested was that a counsel already engaged in a case selected the other counsel who should be briefed with him. If such a thing has been done, I think that it must have been on comparatively rare occasions: such a practice is contrary to the traditions of the profession, and it is also contrary to the best interest of the profession, and such a practice ought to be, and I feel sure would be, discouraged by all who have the interests of the profession at heart.

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CHAUDHURI J. I concur, but I want to add a few words in respect of one of the charges in this case, which was that the Advocate concerned had nominated his junior. Mr. Norton stated that it had become a somewhat frequent practice at the Calcutta Bar, for seniors to name their juniors, and he also said that juniors sometimes nominated their seniors and that in fact his name had once been struck out by a junior member of the Bar. This is a very serious matter, but as Judges of the Court, we can hardly do anything in our judicial capacity, to prevent such gross breaches of the rules of the Bar. What was stated to us implied

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that work was thus being kept within a circle. The matter being mentioned to the Advocate-General, he agreed that it was reprehensible conduct, and assured us that he would take immediate action if the matter was brought to his notice. There is always great reluctance to bring these unpleasant matters to the surface, but I think the Bar owes it to itself to take action in these matters. The Calcutta Bar has justly prided itself on its strength and independence, and I appeal to it to see that its high position is always maintained. Work naturally gets into the hands of a limited circle and there is nothing improper, and it is quite legitimate, for a senior to ask a junior to hold a brief for him, but to form a group is entirely improper. I feel that any attempt to form such a group should be discouraged by the Bar. Mr. Norton's name being struck out by a junior shows, not only that a Bar rule was broken, but also want of respect for senior members of the profession. We honoured them when we were at the Bar. The respect we show to our seniors, results from the feeling of respect one ought always to have for one's profession. I worked as a member of the Calcutta Bar for over 25 years. Its interest and welfare are almost personal questions to me. Although I am now sitting as a Judge, I feel I am a member of the Calcutta Bar, and I hope my appeal to them will not be in vain.

I am glad to say the charge made in this case has not been substantiated. I regret to say that the Day-Book of the Attorney in this case does not inspire the confidence such a document deserves, and I hope the attorney will take note of the fact and improve his methods of work.

O. M.

Rule discharged.

The petitioner in person.

Attorney for the Advocate : *H. C. Bannerjee.*

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ALLAH DITTA AND OTHERS.

(ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.)

P.C.^o
1916Oct. 31 ;
Nov. 2 ;
Dec. 18.

Custom—Inheritance—Customs among tribal communities in the Punjab—Agnates—General custom excluding daughters. Exceptions to—Succession of daughter when married to near collateral who is in her father's house as khana-damad (resident son-in-law)—Riwaj-i-am or official record of customs, value of, as evidence.

A Mahomedan Jat belonging to the sub-community of Dabs settled in the Jhang District of the Punjab, died without male issue, and leaving a widow and a daughter who was married to a near collateral of the deceased who was also his *khana-damad* or resident son-in-law. In a suit by the respondents who as collaterals based their claim to a share of the property of the deceased on a general custom of agnatic succession in the community or tribe to the exclusion of the daughter and her descendants, the appellant, the son of the daughter of the deceased who was the devisee of his will, alleged that a daughter married to a near collateral who takes up his residence in the father-in-law's house as a *khana-damad*, succeeded to her father's inheritance in preference to the agnatics, and produced in support of this special custom the *Riwaj-i-am* or official records of custom in addition to a considerable amount of oral testimony.

Held (reversing the decision of the Chief Court), that on the death of the widow who had inherited the entire estate, the daughter and her son were entitled to succeed in preference to the respondents. Assuming that such a general custom as that relied on by the respondents existed, as to which the decisions of the Punjab Chief Court were by no means uniform, especially in the case of Mahomedan tribes who were endogamous, it was clear that the rule was admittedly subject to many exceptions: see Rattigan's "Digest of Customary Law for the Punjab," Chapter II, paragraph 23, where they are enumerated; and Roe's "Tribal Law in the Punjab," where particular stress is laid on the value of the *Riwaj-i-am* as a

^o*Present*: THE LORD CHANCELLOR (LORD BUCKMASTER), LORD ATKINSON, LORD WRENBURY AND MR. AMEER ALI.

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record of tribal customs and it is said that "a son-in-law of the house is a regular institution."

Held, also, that the Riwaj-i-am was a public record prepared by a public officer in discharge of his duties and under Government rules, and was clearly admissible in evidence to prove the facts therein entered subject to rebuttal. And their Lordships were of opinion that the statements in the Riwaj-i-am for the Jhang District formed a strong piece of evidence in support of the custom set up by the appellant, which it lay upon the respondents to rebut, and they had failed to do so.

APPEAL 94 of 1915 from a judgment and decree (23rd December, 1908) of the Chief Court of the Punjab, by which the decisions of the two lower Courts (the Divisional Judge of Shahpur and the Additional Judge of Jhang) in favour of the appellant, were reversed and the respondent's suit decreed with costs.

The defendant was the appellant to His Majesty in Council.

The main question for determination on this appeal was whether by custom the respondents, as collaterals, were entitled to a half share of the property left by one Shahamad, in the presence of his daughter, Jindwadi, and her son, the appellant, who was devised under his will and whose father Daim was also a near collateral and *khana-damad* of the deceased.

The parties were Mahomedan Dabs, of Mauza Dab Kalan, District Jhang.

Shahamad died on 17th January, 1884, having executed the following will:—"I am now 60 years old. I have no male issue, nor have I any hope to have any. Daim, son of Ahmad, caste Dab, is my son-in-law. He has been living with me since his boyhood, and has been serving me as a son. If a son is born of my daughter, he, after the death of my wife and myself, shall be considered as my adopted son. He shall succeed to the entire property, movable and immovable."

After Shahamad's death his property was possessed by his widow Sahib Bibi, and his daughter Jindwadi and his son-in-law Daim. The suit was brought on 4th April, 1900, on the death of Shahamad's widow, Daim, the son-in-law, having died some years previously. The plaintiffs claimed a decree for possession of one-half the ancestral property left by Shahamad on the ground that as there were no sons, they, as his collaterals, were entitled to that share of the property, Daim and his descendants being admittedly entitled to the other half share.

The defendant, then a minor, defended the suit by his mother as his guardian. He set up the will executed by Shahamad in his favour under which, if genuine, he was entitled to the whole of the property; and he denied the right of the plaintiffs to succeed in competition with the testator's daughter and grandson.

On 31st July, 1901, the suit was dismissed by the Additional District Judge, on the ground that it was barred by a previous decision of the Commissioner of Multan, dated 8th May, 1883. That decree, however, was on appeal set aside, and the suit remanded by the Divisional Judge of Shahpur on 6th January, 1902, to the District Judge under section 562 of the Civil Procedure Code, 1882, for disposal on the merits. Further evidence having been taken, the District Judge held that the will was genuine, and that by custom the testator was competent to make a will in favour of the descendants of his *khana-damad*, and on 20th December, 1902, he accordingly dismissed the suit. That decree was affirmed on appeal by the Divisional Judge of Shahpur on 3rd February 1904. He held that the will was duly executed; and he referred to the *Riwaj-i-am* of the Jhang District from which he was of opinion that the agriculturists of that district had full power of disposition, and that

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a sonless proprietor could make a gift to any of his collaterals, and that consequently the testator had power to bequeath his property to the appellant.

The portions of the *Riwaj-i-am* (prepared at the first regular settlement of 1880) were to the following effect:

“Adoption:—A proprietor is competent to make an adoption provided the adopted son is a collateral, or his daughter or his sister's son; and that such adopted son succeeds to the entire property whether ancestral or self-acquired.

“Gifts:—No restriction is placed on the right of a proprietor to make a gift within the tribe.

“Daughters:—In the absence of male issue the daughter and her descendants succeed to the property provided she is married to a near relation.”

An appeal from the above decision was heard by the Chief Court (A. H. S. REID AND P. C. CHATTERJI, JJ.) affirmed the findings of the lower Courts that the will was genuine and that Daim was *khana-damad*, but remanded the case under section 566 of the Civil Procedure Code to the lower Appellate Court for decision on issues which their Lordships of the Judicial Committee were of opinion were immaterial if the custom set up by the defendant, the present appellant, as to the right of a married daughter was established. They were decided against the present appellant.

When the case came back to the Chief Court after the remand, that Court (SIR W. CLARK C. J. and A. H. S. REID J.) finally disposed of the appeal in the question of the custom set up by the present appellant, reversing the decrees of the lower Courts of 20th December, 1902, and 3rd February, 1904, and decreed the present respondent's suit with costs.

The hearing in the Chief Court will be found reported in (1909) P. R., Case 48.

On this appeal, which was heard *ex parte*,

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Sir Erle Richards, K. C., and *O'Gorman*, for the appellant, contended that the Chief Court was in error in presuming that a rule of custom to exclude daughters prevailing amongst certain exogamous tribes in one part of the Punjab should govern Mahomedan endogamous tribes in another part of that province. There was, it was submitted, no general custom in the Punjab apart from tribe and locality. The *Riwaj-i-am* of the district was wrongly rejected as evidence: it clearly showed that the respondents as collaterals had no right of inheritance in competition with the daughter of the deceased proprietor and her son whose father was also a near collateral, and the *khana-damad* of the deceased. That evidence was not rebutted, and the onus, it was contended, was on the respondents to establish a special custom at variance with the recorded custom of the tribe and locality which they had failed to do. But even it in the first instance was on the appellant, the authority of the *Riwaj-i-am* together with the evidence on the record was sufficient, in the absence of rebuttal, to shift it to the respondents. It was for them to give evidence of instances. The *Riwaj-i-am* as to the Jats was referred to in Rattigan's Digest of the Customary Law of the Punjab, Chapter II, paragraph 23. Reference was made to *Sir Charles Roe's Tribal Law in the Punjab*, *Ralla v. Buddha* (1), *Gujar v. Shamdass* (2), *Sheran v. Sharman* (3), *Fatima v. Khanda* (4), *Jindwaddi v. Hassan Shah* (5), *Ramji Lal v. Tej Ram* (6), and *Bholi v. Fakir* (7); and the cases cited in the final judgment of the Chief Court which, it was submitted,

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(1) (1893) P. R. Case 50.

(4) (1895) P. R. Case 25.

(2) (1887) P. R. Case 107.

(5) (1895) P. R. Case 41.

(3) (1900) P. R. Case 117.

(6) (1895) P. R. Case 73.

(7) (1906) P. R. Case 37.

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were not effective against the above contentions. Reference was also made to *Digambar Singh v. Ahmad Sayed Khan* (1), a case dealing with the wajib-ul-arz; Punjab Land Revenue Act (XVII of 1887), ss. 31 and 44, and Punjab Laws Act (IV of 1872), s. 5 (a). The deceased proprietor had full power to make the disposition of the property which was in dispute. The appeal should be allowed.

The judgment of their Lordships was delivered by
 Dec. 18. MR. AMEER ALI. This is an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 23rd of December, 1908, and arises out of a suit instituted by the plaintiffs, respondents, so long ago as the 4th April, 1900, in the Court of the Additional District Judge of Jhang, for possession of some landed property situated in that district.

The property in suit was owned and possessed by one Shahamad, a Mahomedan Jat, belonging to the sub-community of Dabs, settled in the Jhang District in Southern Punjab. Shahamad died many years ago, leaving a widow, Sahib Bibi, and a daughter named Jindwadi, who was married to a near cousin of the name of Daim. The defendant, appellant, is the son of Daim and Jindwadi. On Shahamad's death, his widow succeeded to his entire inheritance and remained in possession until her death, which is stated to have occurred a year before the litigation commenced. On the widow's death, Jindwadi, acting on behalf of her son, obtained an order from the Collector for the registration of his name in the Revenue Registers as proprietor in succession to Shahamad.

The plaintiffs claim to be the collaterals or agnatic relations of Shahamad, and as such entitled by the

custom of their tribe or community to their share of his inheritance on the death of the widow, to the exclusion of his daughter and the daughter's son. The action, however, is confined to a moiety of Shahamad's estate, as it is admitted that Daim was also a collateral and entitled to a half.

The suit was brought against Beg, who was evidently an infant at the time, under the guardianship of his mother. He denied the plaintiffs' title to the inheritance of Shahamad "in the presence of his daughter and grandson." He further alleged that Shahamad had executed a will under which also he was entitled to his grandfather's estate. He also stated that his father, Daim, lived and worked with Shahamad in his lifetime. It is unnecessary to refer to the earlier stages of the suit, which proved infructuous. The first adjudication on proper issues was made by the District Judge on the 20th December, 1902. The real controversy between the parties is clear from the issues framed by him and his judgment thereon. It appears that whilst the plaintiffs based their claim to possession on a general custom of agnatic succession in their community or tribe, the defendant, without, so far as their Lordships can see, admitting the contention, alleged that a daughter married to a collateral who takes up his abode in the father-in-law's house and is known as the *khāna-dāmād*, or "resident son-in-law," succeeds to her father's inheritance to the exclusion of the agnates. And in support of this special custom he produced the *Riwāj-i-am*, or "official records of custom," in addition to a considerable amount of oral testimony.

Some of the issues were specifically directed to the respective contentions of the parties with regard to the custom. The District Judge in substance held that although there was a custom more or less general

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among the agriculturist tribes of the Punjab by which daughters were excluded from succession, the existence of another custom, by way of exception, was established by which married daughters residing with their husbands in the paternal house were not subject to the deprivation of the inheritance. He held also that the will set up by the defendant was proved. With regard to the custom alleged by the defendant, his conclusion is expressed in the following words:—

“Then the *khāna-dāmādi* (the status of Daim as a resident son-in-law)” is proved; this is a recognised custom, that a daughter or her descendants get the inheritance in preference to the collaterals. The same is the result of the local commissioners’ report and of the evidence of the witnesses for the defendant.”

He thus found expressly in favour of the existence of the custom on the basis of which the defendant contended the plaintiffs must fail; and he accordingly dismissed the action.

From this judgment the plaintiffs appealed to the Divisional Judge, who affirmed the first Court’s decree with a specific finding based on the *Riwāj-i-ām* in accord with the District Judge. And he added that “nothing had been proved to contradict this custom”—the custom alleged by the defendant.

From this decision the plaintiffs preferred an appeal to the Chief Court. On this appeal the learned Judges held that the will propounded by the defendant was genuine and that Daim was, in fact, a *khāna-dāmād*; but they considered that the finding of the lower Courts was not sufficient for the disposal of the case and they accordingly remanded it for an enquiry as to whether the property left by Shahamad was ancestral or self-acquired, what his powers of disposition were, and so forth—questions in their Lordship’s opinion, wholly immaterial if the custom was established. The order of remand is dated the 16th November, 1905,

and the appeal did not come on for further hearing until 1908.

After the remand, the matter came before two different officers. The second District Judge, under the orders of the Divisional Judge (not the same Judge who had decided the first appeal), held an elaborate enquiry practically on the same points that had been already decided; his report came before the Divisional Judge, who also went over at considerable length the same ground.

He put aside the statements in the *Rivāj-i-am*, apparently on the ground that they required to be proved by instances before any value could be attached to them. With regard to the evidence of instances, he thought it referred, with one exception, to other sections of the community, and did not apply to the Dabs. The Divisional Judge further held, in agreement with his predecessor, that the plaintiffs had, on their side, failed to rebut the defendant's allegation as to the existence of a special custom relating to the succession of married daughters among the Dabs.

On the return of the case to the Chief Court, the appeal was reheard by two Judges, one of whom was a party to the order for remand. The question was this time confined to the existence of the custom alleged by the defendant; and the learned Judges, being of opinion that the defendant had failed to establish his allegation, reversed the decision of the first Divisional Judge, dated the 3rd February, 1904, and decreed the plaintiffs' claim.

From this decree the defendant Beg has appealed to His Majesty in Council. Their Lordships cannot help thinking that, had it not been overlooked that the main issue in the case at which the lower Courts had arrived at a distinct finding related to the existence of the custom, twelve years' ruinous litigation

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might have been avoided. It may be observed here that the Judges who decided in favour of the existence of the custom alleged by the defendant appear to have correctly apprehended the incidence of the *onus*.

In their Lordships' opinion the Chief Court are in error in supposing that the defendant did not discharge the onus that lay on him of establishing the custom he alleged. Assuming that there is a general custom of agnatic or collateral succession in default of male issue to the exclusion of female heirs among the agricultural tribes of the Punjab, about which the decisions of the Punjab Chief Court are by no means uniform, especially in the case of Mahomedan tribes who are endogamous, it is clear that the rule is admittedly subject to a considerable number of exceptions. Mr. Rattigan, in his valuable work called "A Digest of Customary Law for the Punjab," enumerates the exceptions under paragraph 23. Sir Charles Roe, himself at one time a Judge of the Chief Court, in his "Tribal Law in the Punjab," lays particular stress on the value of the *Riwāj-i-ām* as a record of tribal customs; and, he adds, that "a son-in-law of the house is a regular institution."

In the *Riwāj-i-ām* filed in this case the custom alleged by the defendants is mentioned in express terms as in force among the Syeds, Kureshis, and Syals. With regard to the general body of Jats (in which term the sub-community of Dabs is clearly included) the custom is simply mentioned as "that prevailing among the Syals."

The *Riwāj-i-ām* was produced and exhibited as evidence at the very outset of the case; it is a public record prepared by a public officer in discharge of his duties, and under Government rules; it is clearly admissible in evidence to prove the facts therein entered subject to rebuttal. In their Lordships'

opinion, the statements contained in the *Riwaj-i-am* form a strong piece of evidence in support of the custom, which it lay upon the plaintiffs to rebut, and this, according to the findings of the Divisional Judges, they failed to do.

In their Lordships' opinion, the decree of the Chief Court cannot be sustained, and they will humbly advise His Majesty that it should be set aside, and the plaintiff's suit dismissed with costs in all the Courts in India. The respondents must pay the costs of this appeal.

J. V. W.

Appeal allowed.

SOLICITORS for the appellant: *Ranken Ford, Ford & Chester.*

PRIVY COUNCIL.

TRICOMDAS COOVERJI BHOJA

v.

GOPINATH JIU THAKUR.

P.C.^{*}
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Nov. 6, 7;
Dec. 20.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 110 and 116—Suit for royalties due under a registered lease of land with the right to dig coal—Point not allowed to be taken which was not raised in the lower Courts nor in grounds of appeal to High Court or Privy Council—Form of decree where a party has refused to join as a plaintiff and has been made a defendant—Power to alter decree without an appeal.

To a suit for royalties due under a registered lease of certain land with the right to dig coal, Art. 116 of Sch. II of the Limitation Act, 1877, "for compensation for breach of a contract in writing registered," and providing a six years period of limitation, and not Art. 110 for "a suit

^{*}*Present*: LORD PARKER OF WADDINGTON, LORD SUMNER, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

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for arrears of rent," and giving only three years, was held to be applicable. There is a long established distinction in the Limitation Acts in favour of registered instruments and a long course of decisions in the Indian Courts in support of this interpretation of the Acts.

Ram Narain v. Kamla Singh (1) dissented from.

A point that as the royalty for one kist was in any case barred the amount of the decree should be reduced was held not to be open to the appellant to take, it not having been raised in either of the lower Courts, nor in the grounds of either the appeal to the High Court, or that to the Privy Council.

One of the parties on refusing to join as a plaintiff was made the second defendant and included in his defence a claim for a decree against his co-defendant which the first Court gave him separately from the decree in favour of the plaintiffs. The High Court on appeal altered the form of the decree by giving a decree for the entire amount in favour of the plaintiffs, and declaring that for a named portion it was for their share, and as to the residue it was for the share of the second defendant. The second defendant did not appeal, but the principal defendant by his appeal brought the entire decree before the High Court, disputing it *in toto*.

Held, that in the absence of any provision in the Civil Procedure Code or in any other enactment which showed clearly that the High Court had no power to make the decree it had passed, and the whole decree being before it, the High Court had jurisdiction to make the decree which should have been made by the first Court.

APPEAL 53 of 1914 from a judgment and decree (29th May 1912) of the High Court at Calcutta, which affirmed a judgment and decree (5th July 1909) of the Additional Subordinate Judge of Burdwan.

The principal defendant was the appellant to His Majesty in Council.

The appellant was the son of one Cooverji Bhoja, now deceased, who at one time carried on business as a merchant in Calcutta. The respondents were the shebaitis of the Thakur Sri Sri Gopinath Jiu, and were the joint proprietors in that capacity, of mauza Bahal in Raniganj in the District of Burdwan.

On 24th May 1901 (10th Jaistha 1908), Cooverji

Bhoja took a lease of certain coal lands in mauza Bahal from the shebait on the terms (*inter alia*) that he should pay a minimum royalty of Rs. 4,000 per annum by four equal instalments commencing from the 17th November 1901 (1st Aughran 1308), with interest at one per cent. per mensem on instalments remaining unpaid; that he should be at liberty to deduct a sum of Rs. 5,000 advanced by him on account of royalty by setting off Rs. 1,000 yearly against the royalty due for each of the five years from 1901 (1308) to 1906 (1313) and that he should be at liberty to sell and transfer his rights under the lease to any suitable person. The lease was registered.

On 9th January 1908, Cooverji Bhoja sold and conveyed all his rights under the lease to one Mokunda Lal Naik. No work was done by Cooverji Bhoja in connection with the mine; no coal was raised, and, with the exception of the sum of Rs. 5,000, no royalty was paid by him to the shebait up to the beginning of December 1907.

On 5th March 1908, the three plaintiffs-respondents instituted the suit, out of which this appeal arose, against Cooverji Bhoja for recovery of the royalties from November 1901. The defendant-respondent, Debanand Mohunt Thakur, their co-shebait, was joined as a defendant as he refused to join as a plaintiff with them in the suit.

The defendant Cooverji Bhoja's defence was that he had on 4th December 1907 (18th Aughran 1314) paid Rs. 17,796 in full of what was due by him in respect of royalties to three of the shebaites for which a receipt had been given him.

The defendant-respondent Debanand Mohunt denied the payment of Rs. 17,796 as alleged by Cooverji Bhoja, and set up the case that he had demanded separately his one-fourth share of the royalties from the lessee

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and had on 3rd December 1907 (17th Aghran 1314) received from him Rs. 4,000 on account of what was due to him in respect of his share. He further alleged that the shebaita were in the habit of realising their respective shares of the rents due from tenants sometimes jointly and sometimes separately, and he claimed that he as a defendant was entitled to a decree for his one-fourth share of the royalties after deducting the sum of Rs. 4,000 which he had already received.

Pending the hearing of the suit, Cooverji Bhoja died, and his son, the appellant, was substituted on the record as defendant in his place.

The Subordinate Judge decided against the case set up by the appellant as to the payment of Rs. 17,796, and in favour of that put forward by the defendant-respondent as to the payment to him of Rs. 4,000 by Cooverji Bhoja on account of his one-fourth share in the royalties due, and he held that the defendant-respondent was entitled to a decree for the balance of his share. He accordingly made a decree in favour of the plaintiffs-respondents for Rs. 18,658 odd, and in favour of the defendant-respondent for Rs. 2,090 odd, as representing their respective share in the royalties due, with proportionate costs to each of them to be paid by the appellant.

On appeal the High Court (CHITTY AND TEUNON JJ.) affirmed the findings of the Subordinate Judge as to the appellant having failed to prove the payment of Rs. 17,796, and as to the defendant-respondent having established his case as to the Rs. 4,000 paid to him by Cooverji Bhoja. They also held that though the decree in favour of the defendant-respondent could not be supported, the form of the decree could be changed (though there was no appeal by the respondents on such a ground) by giving to the plaintiffs-

respondents what had been decreed to the defendant-respondent. The High Court further held that the whole claim was recoverable as being within the period of limitation provided by Article 116 of Schedule II of the Limitation Act, 1877, the case as to that point being concluded by the decision of the High Court in *Umesh Chunder Mundul v. Adarmoni Dassi* (1).

The High Court accordingly made a decree setting aside so much of the Subordinate Judge's decree as ordered the payment of Rs. 2,090 odd to the defendant-respondent, and substituted for it a direction that the said amount should be decreed to the plaintiffs-respondents on account of the share of the defendant-respondent in addition to the sum of Rs. 18,658 odd which represented their own share of the royalties.

On this appeal,

De Gruyther, K. C., and *A. M. Dunne*, for the appellant, contended that the High Court considering itself bound by the case of *Umesh Chunder Mundul v. Adarmoni Dassi* (1), had wrongly decided that the suit was governed by Article 116 of Schedule II of the Limitation Act, 1877, which allowed a period of six years for the suit, so that no part of the claim was barred. That case followed the case of *Vythilinga Pillai v. Thethanamurli Pillai* (2). Article 116 applied to suits for "compensation for breach of a contract in writing registered." But, it was submitted, the present suit was one for rent to which Article 110 of Schedule II of the Limitation Act applied, limiting the period to three years from the time when the rent became due: part of the claim was therefore barred. Reference was made to *Ram Narain v. Kamta Singh* (3). That Article applied notwithstanding the lease was registered

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(1) (1887) I. L. R. 15 Calc. 221. (2) (1880) I. L. R. 3 Mad. 76.

(3) (1903) I. L. R. 26 All. 138.

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"Compensation," in Article 116 only applied to unliquidated damages, as in section 73 of the Contract Act, 1872, illustration (n). Royalties may be rent, but this is not a suit for sums due for the use and occupation of the land. "Rent" is defined in the "Encyclopædia of English Law"; and "royalties" in the case of *Attorney-General of Ontario v. Mercer* (1). The decree of the High Court in favour of Debanand was wrong. There was no power to alter the first Court's decree in favour of a defendant who had not appealed.

Sir William Garth, for the plaintiffs-respondents. Limitation in the appellant's written statement; and the Court was not entitled to entertain the contention under section 4 of the Limitation Act and allow the point to be raised at this stage of the case. That section was only applicable where it is clear on the face of the claim made in the plaint that the suit is barred. Here it is doubtful, the claim being for royalties, not for rent. The current of authorities supports the High Court's decision. [The Board intimated that they did not desire to hear more on the question of limitation.] On the second point, the appeal was from the whole decree; the High Court was therefore entitled to alter it as it had done.

De Gruyther, K. C., called on to reply, said he had nothing to add to his arguments.

The judgment of their Lordships was delivered by

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LORD SUMNER. In this case an idol, by his Paricharaks and Shebaites, sued to recover mining royalties under a lease of his colliery property in Burdwan. The Shebaites, who made the agreement in suit, were four brothers, and the property was the *ijmali debottar* property of their family deity. Owing

to some quarrel, the collection of rents was not always joint and, at the time when the principal defendant was making default in paying the royalties, one of the brothers obtained from him payment of 4,000 rupees on account of his share, on the terms that, if his co-sharers did not agree to give up their claim to interest and be content with like sums, he was to be paid by the principal defendant in the same proportion as the co-sharers might be paid. This brother was accordingly unwilling to join as a plaintiff in bringing the suit and so was joined as a second defendant. As such he appended to his defence a claim against the first defendant to recover *pari passu* with the plaintiffs, after giving credit for the 4,000 rupees already paid, in case they should make out their claim. This was, of course, quite irregular in point of pleading, and gives rise to a technical question of minor importance. The suit was begun more than three and less than six years after the cause of action accrued, and the main question is whether or not the whole claim is Statute-barred.

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The lease was effected by a mokurari kabuliyat and a pottah expressed in similar terms. The first defendant agreed that if he failed to cut any coal at all, he would pay a minimum royalty of 4,000 rupees per annum. It is certain that he cut no coal: whether or not he even entered or took possession is not so clear. The sum to be paid per maund of coal gotten is called "commission" and not "rent," but the right acquired by the principal defendant is described as a "settlement." The kabuliyat runs—

"On a proposal being made to take a settlement of the rights of your family deity in this mouzah for the purpose of raising coal from below the surface of the said mouzah by making pits, you, for the benefit of your family god, and with the object of increasing the income of the debottar property, are making a settlement with me of the right and interest in the said mouzah to the extent owned by your family deity."

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Their Lordships accordingly take it, as seems to have been done by the Courts below, that the minimum royalty sued for would be "rent" within article 110 of Act XV of 1877, which is the enactment applicable.

The kabuliyat sued on was a registered instrument and the question is whether the suit is one for arrears of rent, as the appellant lessee says, and so is barred by article 110, or whether, as the respondent-lessors contend, it falls within article 116 as a suit for "compensation for breach of contract in writing registered," and thus was brought within time. The argument for the appellant is that the suit being for arrears of "rent" is in terms within article 110 and is not, truly speaking, a suit for compensation for breach of contract at all, since the lessee does not covenant to get coal but is at liberty, on paying the agreed minimum royalty, to let the coal alone, and commits no breach of contract if he chooses to do so.

The Limitation Act No. XIV of 1859 provided that the period of limitation applicable to "all suits for the rents of any buildings or lands" should be three years (§ 8); the period applicable to suits brought "for the breach of any contract" three years, unless in the case of a contract which could have been registered such registration had taken place within six months from the date of the contract (§ 10); and, thirdly, that the period applicable "to all suits for which no other limitation is herein expressly provided" should be six years. Act IX of 1871 repeals the Act of 1859, and adopts the present framework of a schedule subdivided into articles and columns. Schedule 2, Part VI, the part which comprises the cases to which the period applicable is three years, includes article 110 "for arrears of rent" and article 115 "for the breach of any contract, express or implied, not in writing registered and not herein specially provided

for." Part VII, which included the cases to which the period applicable was to be six years, contained article 117—"on a promise or contract in writing registered." This Act in turn was repealed by Act XV of 1877, which re-enacted article 110 in the same terms, and article 115 almost in the same terms, *viz.*, "for compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for," and in Part VII substituted article 116 for article 117, thus, "for compensation for the breach of a contract in writing registered."

Both these Acts draw, as the Act of 1859 had drawn, a broad distinction between unregistered and registered instruments much to the advantage of the latter. The question eventually arose whether a suit for rent on a registered contract in writing came under the longer or the shorter period. On the one hand it has been contended that the provision as to rent is plain and unambiguous, and ought to be applied, and that in any case "compensation for the breach of a contract" points rather to a claim for unliquidated damages than to a claim for payment of a sum certain. On the other it has been pointed out that "compensation" is used in the Indian Contract Act in a very wide sense, and that the omission from article 116 of the words, which occur in Article 115, "and not herein specially provided for," is critical. Article 116 is such a special provision, and is not limited, and therefore, especially in view of the distinction long established by these Acts in favour of registered instruments, it must prevail. There is a series of Indian decisions on the point, several of them in suits for rent, though most of them are in suits on bonds. They begin in 1880, and are to be found in all the Indian High Courts. In spite of some

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doubts once only was it held in 1903 [*Ram Narain v. Kamta Singh* (1)], that in such a suit article 110 and not article 116 applied. Then in 1908, and in this state of the decisions, Act IX of 1908 replaced the Limitation Act of 1877 without altering the language or arrangement of the articles and in 1913, in *Lalchand v. Narayan* (2) the High Court of Bombay held that, especially in view of this re-enactment, the current of decisions must be followed, and *Ram Narain's Case* (1) must be disapproved. In the present case the High Court treated the matter as settled law in the same sense.

Where the terms of a Statute or ordinance are clear, their Lordships have decided that even a long and uniform course of judicial interpretation of it may be overruled, if it is contrary to the meaning of the enactment [*Pate v. Pate* (3)]. Such is not the case here. However arguable the construction of Act XV of 1877 may have been when the matter was one of first impression, it certainly cannot be said that the construction, for which the appellant argues, was ever clearly right. On the contrary, their Lordships accept the interpretation so often and so long put upon the Statute by the Courts in India, and think that the decisions cannot now be disturbed.

The question of limitation was not discussed at the trial. The principal defendant pleaded payment, made it his main case, failed in it, and now acquiesces in his failure. The decree passed was for royalties up to a certain amount, and was in favour of the plaintiffs for three-fourths and of the second defendant for one-fourth, less credit for the sum admittedly received by him on account. In form this decree was erroneous, and this was admitted in the High Court. The point

(1) (1903) I. L. R. 26 All. 138. (2) (1913) I. L. R. 37 Bom. 656.

(3) [1915] A. C. 1100.

was doubtless not brought to the attention of the Trial Judge; otherwise the proceedings could readily have been put in proper form, all the more because the second defendant, though concluding his defence with a claim for a decree against his co-defendant, had previously pleaded that he was entitled to part of the entire arrears of royalties, the subject of the plaintiffs' claim, and had prayed "that this suit may be ordered to be prosecuted upon making this defendant a plaintiff." The High Court corrected the admitted error by making a decree for the entire amount in favour of the plaintiffs, and declaring that, as to a named part, it was for their share and as to the residue it was for the second defendant's share. The principal defendant by his appeal had brought the entire decree before the High Court, disputing it *in toto*. It was one decree, not two. The second defendant had not appealed. The now appellant argues that, for want of a separate appeal by the second defendant, the High Court had no jurisdiction to award to the plaintiffs for his benefit the sum which had been awarded to him directly by the Trial Judge. It was said that, as the second defendant, by not appealing, stood by the decree as made below, and as in that form it was wrong, he must lose his right altogether. It would be unjust if this were so. Nevertheless, if the appellant could have shown any provision of the Civil Procedure Code, or of any other enactment, which showed clearly that the High Court had no such power, the objection must have prevailed. No such provision was cited. The appellant himself had brought the entire decree of the Trial Judge before the High Court for review, and thus they were right in making the decree, which should have been made below, even though the second defendant had given no notice of appeal.

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A point was also made that as to the royalty for one kist the claim was in any case Statute-barred and that the amount of the decree should be reduced accordingly. Their Lordships think that this point is not open to the appellant. There is no trace of its having been raised before either Court below. It does not appear in either the notice of appeal to the High Court or in the grounds for applying for leave to appeal to their Lordships' Board. If it is raised at all by the appellant, in the reasons appended to his case, it is raised only obscurely. It depends on the construction of the kabuliyat in a respect not submitted to either Court below, and their Lordships decline to entertain it.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

J. V. W.

Appeal dismissed.

Solicitors for the appellant: *Watkins & Hunter.*

Solicitors for the plaintiff-respondents and the representatives of plaintiff-respondent No. 1: *Theodore Bell & Co.*

APPELLATE CIVIL.

Before Mookerjee and Cuming JJ.

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Title—Grantor and grantee—Bengal Tenancy Act (VIII of 1885), s. 85, sub-s. (1), construction of—Contravention of the section, effect of—Estoppel, its application.

The title of a grantee who can fall back upon prior possession as tenant or otherwise, cannot be defeated by mere proof of contravention of s. 85 of the Bengal Tenancy Act; and as between grantor and grantee, the rule of estoppel applies when the elements essential to attract its operation are proved to exist.

The creation of complete relation of landlord and tenant in law estops the tenant from denying the validity of the title which he has admitted to exist in the landlord. The estoppel arises not by reason of some fact agreed or assured to be true, but as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor.

Bhaiganta Bewa v. Himmat Bidyakar followed (1).

It is no more open to the defendant than to the plaintiff to prove facts contrary to the allegations which formed the basis of the contract, after the contract has been carried into execution and the contracting parties have enjoyed benefits thereunder.

Madan v. Jaki (2), *Gopal Mondal v. E-han Chunder Banerjee* (3), *Tamijuddi v. Asgar Howladar* (4), *Janakinath v. Prabhasini* (5), *Lani v. Muhammad* (6), *Gonesh v. Thanda* (7) referred to.

* Appeal from Original Decree, No. 118 of 1914, against the decree of Nagendra Nath Dhar, Subordinate Judge of Krishnagar, dated Dec. 22, 1913.

(1) (1916) 24 C. L. J. 103.

(4) (1908) I. L. R. 36 Calc. 256.

(2) (1902) 6 C. W. N. 377.

(5) (1915) 22 C. L. J. 99.

(3) (1901) I. L. R. 29 Calc. 148.

(6) (1915) 20 C. W. N. 948.

(7) (1914) 24 C. L. J. 539.

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APPEAL by Bamandas Bhattacharjee and others, the plaintiffs.

This appeal arose out of a suit for recovery of money by way of damages, etc. The claim was laid at Rs. 6,648. The plaintiffs and one Sarada Prashad Bhattacharyya held *jote* of 12 annas share of char Jhutrada under the malik Girish Chandra Mozumdar, the share of the plaintiffs in the *jote* being 9 annas 12 gandas, and that of Sarada being 2 annas 8 gandas. The principal defendants (Nos. 1 to 25, No. 26 being the common manager appointed by the District Judge in respect of the estate of the defendants Nos. 1 to 25) executed a *kabuliyat* in favour of the plaintiffs on the 12th Bhadra 1303 and took *kaimi dar-jote* settlement of the plaintiffs' 9 annas 12 gandas share of the *jote*, the *jama* being fixed at Rs 688-4 per annum. Under the terms of the *kabuliyat* the principal defendants agreed to pay Rs. 538-4 out of the said *jama* to the malik for the rent payable by the plaintiffs for their share in the *jote* and to pay the balance Rs. 150 to the plaintiffs as *munafa* every year according to the allotted *kists* and further agreed to pay all damages to the plaintiffs including the value of loss of any property which might be sold by the *malik* in execution of any decree for rent against the plaintiffs by reason of default in the part of the defendants in paying the rent due to the malik as agreed upon. The defendants further agreed that in case the *jama* of the *mahal* was varied by the Collector in future defendants would be liable for the increase in the *jama* and would enjoy the benefit of any decrease, but would continue to pay the *munafa* of Rs. 150 to the plaintiffs always without any alteration. The *dar-jote* settlement was taken in the name of Gopal Das Banerjee, an officer of the principal defendants. The defendants, having neglected to pay the

rents due to the *malik* from the middle of the 1315 to the middle of 1317 B.S., the maliks obtained a decree for the rents against the plaintiffs for Rs. 2,987-11-9 with interest and sold the *jote* in arrears in execution of the decree on the 14th of June 1911. The principal defendants purchased the *jote* at the sale in the name of their mukhtear, Babu Radha Nath Roy, for Rs. 1,600. The plaintiffs had to pay their share of the balance of the decree with costs amounting to Rs. 1,264 odd. The plaintiffs thus had to pay Rs. 2,544-7-3 on account of the decretal debt, besides Rs. 626-4-3 on account of a decree obtained by the *malik* for rents of the *jote* for the last 8 annas *kist* of 1317 B. S. The aggregate amount thus paid by the plaintiffs was Rs. 3,170-11-6 which together with interest (Rs. 99-4-6) thereon at 12 per cent. came up to Rs. 3,270. The loss caused to the plaintiffs by the defendants for the years 1316 and 1317 was fixed at Rs. 300 and interest on the latter up to the date of the suit was reckoned at Rs. 78. All these sums, amounting to Rs. 6,648, the plaintiffs claimed under the terms of the *kabuliyat*.

The principal defendants appeared through their common manager, defendant No. 26. They contended, *inter alia*, that the suit was barred by limitation, that the *kabuliyat* of 12th Bhadra 1303 was not binding under section 85 of the Bengal Tenancy Act; that Gopal Das Banerjee was not the *benamidar* of these defendants and that these defendants did not admit that Gopal Das executed the *kabuliyat* on behalf of these defendants; that as there were *korfa* tenants of the lands from before the settlement under the *kabuliyat* in question no valid title was acquired under it; that the damages were excessive. The Subordinate Judge held that the *kabuliyat*, dated 12th Bhadra, 1303 B. S., was not a valid and binding

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document as between the parties and dismissed the suit. Hence this appeal.

Babu Mahendra Nath Roy, Babu Barinasibasi Mookerjee, Babu Khettra Mohan Ghose, Babu Sarat Chandra De and Babu Santosh Kumar Bose, for the appellants.

Sir S. P. Sinha, Babu Surendra Chandra Sen and Babu Dwijendra Nath Mookerjee, for the respondents.

Cur. adv. vult.

MOOKERJEE AND CUMING JJ. This is an appeal by the plaintiffs in a suit for recovery of arrears of rent under a lease, and of damages for breach of a covenant contained therein. On the 27th August 1896, the plaintiffs granted the lease to the defendants in respect of an area of 942 bighas; the interest of the grantors was described as that of tenure-holders and the grantees who paid a premium of Rs. 1,280 were made under-tenure-holders by the instrument. The rent was fixed in perpetuity at Rs. 688-4-0; the tenants undertook to pay Rs. 538-4-0 direct to the superior landlord of their grantors and, the balance Rs. 150, to the lessors themselves. The lease contained a covenant that "if by reason of nonpayment of the rent due to the superior landlords, year after year, instalment by instalment, a suit is brought against the lessors and if in execution of the rent decree the tenure or other property of their lessors is attached and sold in auction, the lessees will be bound to pay the rent due with interest, costs and damages, and the proper value of such properties of the lessors as may be sold." The contingency thus contemplated did not happen for many years, as the lessors, who entered into possession of the lease-hold property under this instrument, duly

performed their obligations. On the 29th November, 1910, however, the superior landlord instituted a suit against the present plaintiffs for recovery of rent for the two years 1908-10; it is not disputed that this rent had fallen into arrears, because the present defendants had failed to pay to the superior landlord the rent due as they had undertaken to do in the lease. The suit was decreed on the 4th January 1911, for a sum of Rs. 2,987: execution was taken out in due course and the tenure was sold on the 14th June 1911, when it was purchased by the present defendants for a sum of Rs. 1,600. As the rent decree was thus satisfied only in part, the plaintiffs, on the 21st December 1911, paid to the decree-holder the balance of the judgment-debt, that is a sum of Rs. 1,264. The superior landlord, on the 10th May 1912, obtained against the plaintiffs a supplementary decree for Rs. 549 and costs and interest, on account of rent due for the period between the date of institution of the previous suit and the date of sale of the tenure. The plaintiffs satisfied this decree on the 30th June 1912, and on the 7th August 1912, they instituted this suit for recovery of Rs. 6,470 composed of five items, namely, Rs. 1,280 as their share of the proceeds of the sale held on the 14th June 1911, Rs. 3,000 as the value of the property sold, Rs. 1,264 as the amount paid in satisfaction of the first decree, Rs. 626 as the amount paid to satisfy the second decree, and Rs. 300 as the arrears of rent due for two years. The defendants resisted the claim, substantially on the ground that the plaintiffs were not tenure-holders but occupancy ryots, that the permanent lease in their favour was void and inoperative as granted in contravention of section 85 of the Bengal Tenancy Act and that they were, consequently, not bound by any of the covenants in the lease. They further pleaded that the damages claimed were

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excessive. The Subordinate Judge has found the main facts in favour of the plaintiffs, but he has dismissed the suit on the ground that as the plaintiffs were in reality occupancy ryots and not tenure-holders, the lease was void under section 85 of the Bengal Tenancy Act. On the present appeal, the decree of the Subordinate Judge has been assailed as erroneous in law and as not really supported by the decisions mentioned by him, namely, *Jarip Khan v. Dorfa Bewa* (1) and *Telam Pramanik v. Adu Sheikh* (2).

Section 85 of the Bengal Tenancy Act provides as follows: "(i) if a ryot sublets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord, unless made with the landlord's consent: (ii) a sub-lease by a ryot shall not be admitted to registration if it purports to create a term exceeding nine years." The third sub-section refers to sub-leases granted before the commencement of the Bengal Tenancy Act and has obviously no possible application to the present case. The question for consideration is, whether the first two clauses apply and, if so, what is their effect upon the rights of the parties. It is plain that the first sub-section has no application, because the superior landlord of the plaintiffs is not a party to this litigation, and neither the plaintiffs nor the defendants have argued that the lease of the 27th August 1896 is valid against him. The controversy is thus restricted to the second sub-section. With reference thereto, the defendants contend that the lease of the 27th August 1896, is in essence a sub-lease by a ryot within the meaning of sub-section (2), that it should not have been admitted to registration, that the fact of registration contrary to law must be ignored, that the instrument is thus

(1) (1912) 16 C. L. J. 144 ;

(2) (1913) 17 C. W. N. 468.

17 C. W. N. 59.

inadmissible in evidence under section 49 of the Registration Act, and that there is accordingly no proof that the defendants hold as tenants under the plaintiffs on the conditions mentioned therein. The plaintiffs put forward a two-fold answer to this argument, namely, *first*, that the defendants who entered into possession under the lease are barred by the doctrine of estoppel and are not competent to question the title of their lessors as tenure-holders on proof that they were in reality occupancy ryots; and, *secondly*, that if the defendants are permitted to question the title of their lessors and to prove that the instrument which is the root of their own title is inoperative under section 85(2), still it is open to the plaintiffs to establish independently of the lease that the defendants were their tenants, that they entered upon the land as such and that they have been in occupation for many years by payment of rent on certain terms and subject to certain liabilities in the event of default. It is obvious that the second branch of this contention will not require examination if the first is, as we think it must be, sustained.

It is well settled that the creation of the complete relation of landlord and tenant has the effect in law of estopping the tenant to deny the validity of the title which he has admitted to exist in the landlord; the estoppel arises, not by reason of some fact agreed or assumed to be true, but as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor. The grounds of this rule were recently examined by this Court in *Bhaiganta Bewa v. Himmat Bidyakar* (1), where the following observation was made: "enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his

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landlord ; two conditions are essential to the existence of the estoppel, *first*, possession ; *secondly*, permission ; when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues." From this point of view, the defendants are not competent to deny that the plaintiffs are tenure-holders ; they cannot be permitted to allege or prove that the plaintiffs were occupancy ryots at the date of the lease executed in their favour ; consequently, the case does not attract the operation of section 85 (2) of the Bengal Tenancy Act ; in other words, the defendants cannot show that the lease was void and that no interest passed to them. The case thus falls within the rule that where no interest passes, an estoppel arises [*Trevivan v. Lawrance* (1)], and not within the converse rule that where an interest passes no estoppel arises [*Doed. Strode v. Seaton* (2), *Langford v. Selmes* (3)]. The justice of the view we take will be obvious from a consideration of the case converse to what has happened here. Suppose after the lessees had gone into possession, the lessors had sued to eject them on the plea that they were occupancy ryots and not tenure-holders and that the sub-lease was consequently void under section 85 (2). The lessees would plainly have been entitled to rely on the doctrine of estoppel to defend their position. But, as was pointed out by the Judicial Committee in *Girija Kant v. Hurrish Chunder* (4), and by the House of Lords in *Concha v. Concha* (5), estoppels are as a general rule, mutual, or in the language of Lord Coke, "every estoppel ought to be reciprocal, that is, to bind both parties, and this is the reason that regularly a stranger shall neither take advantage

(1) (1705) 1 Salk 276; 6 Mod. 256. (3) (1857) 3 Kay & J. 321.

(2) (1835) 2 C. M. & R. 728.

(4) (1872) 19 W. R. 114, 117.

(5) (1886) 11 A. C. 541.

of nor be bound by the estoppel" [Co. Litt. 352; *Lilabati v. Bishun* (1)]; we feel no doubt whatever that the parties to this litigation are mutually bound by the terms of the lease of the 27th August 1896, and that it is no more open to the defendants than to the plaintiffs to prove facts contradictory to the allegations which formed the basis of the contract, after that contract had been carried into execution and the contracting parties had enjoyed benefits thereunder. In fact, the Advocate General, with the candour which always characterises his arguments, did not seriously contest the correctness of this view.

The question remains, however, whether the numerous judicial decisions which interpret section 85 of the Bengal Tenancy Act and which are by no means easy to reconcile, militate against this conclusion. The majority of those decisions, to which we shall presently make a brief reference, do not really touch the cardinal question in controversy in this suit; but before we consider them, two important principles may be conveniently restated. In the first place, as is clear from the decision of the Full Bench in *Kripa Sindhu v. Annada Sundari* (2), the Bengal Tenancy Act is not a complete Code even in respect of the law of landlord and tenant; much less does it profess to incorporate the general principles of the Law of Contract, and the doctrines of Equity Jurisprudence, in so far as they may have to be applied in the determination of disputes between landlords and tenants. In the second place, as pointed out by Lord Haldane, L. C. in *G. and C. Kreglinger v. New Patagonia Meat and C. S. Co.* (3), each case forms a real precedent, only in so far as it affirms a principle, and the binding force of previous decisions, unless

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(1) (1907) 6 C. L. J. 621, 627. (2) (1907) I. L. R. 35 Calc. 34.

(3) [1914] A. C. 25.

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the facts are indistinguishable, depends on whether they establish a principle. "To follow previous authorities, so far as they lay down principles, is essential, if the law is to be preserved from becoming unsettled and vague. In this respect, the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in systems where the paramount authority is that of a Code. But when a previous case has not laid down any new principle, but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent. The consideration of cases which turn on particular facts may often be useful for edification, but it can rarely yield authoritative guidance."

As regards the decisions upon the construction of section 85 of the Bengal Tenancy Act, it is plain that a long line of cases affirm the view that a lease granted in contravention of section 85 (1) is operative as between the grantor and the grantee: *Madan v. Jaki* (1), *Gopal v. Eshan* (2), *Tamijuddi v. Asgar* (3), *Bipin Behari v. Amritalal* (4), *Arab Ali v. Rachimuddi* (5), *Ali v. Nayan* (6), *Abdul Karim v. Abdul Rahman* (7), *Janaki v. Prabhasini* (8), *Lani v. Muhammad* (9). The only case which supports the contrary view is the decision of Geidt J. in *Bisaratulla v. Kasirunnessa* (10),

(1) (1902) 6 C. W. N. 377.

(6) (1903) 15 C. L. J. 122.

(2) (1901) I. L. R. 29 Calc. 148.

(7) (1911) 15 C. L. J. 672.

(3) (1908) I. L. R. 36 Calc. 253.

(8) (1915) 22 C. L. J. 99.

(4) (1908) 9 C. L. J. 76.

(9) (1915) 22 C. W. N. 948.

(5) (1911) 13 C. L. J. 653.

(10) (1906) 11 C. W. N. 190.

which, so far as we have been able to discover, has not been followed in any subsequent decision. The conclusion as to the binding character of the lease as between grantor and grantee may be supported on one of two grounds, namely, *first*, that the validity of a lease granted in contravention of section 85 (1) can be questioned only by the landlord of the grantor or by the holder of a derivative title from him; or *secondly*, that the doctrine of estoppel binds the grantor and grantee equally and debars each from disputing the validity of the lease to the detriment of the other. The first of these principles has not been universally accepted and is possibly in conflict with the rule enunciated in *Jarip Khan v. Dorfa Bewa* (1), and *Telam v. Adu* (2). These cases, however, do not affect the authority of the decision in *Manik v. Bani* (3), which was followed in *Gonesh v. Thanda* (4). It is not necessary for our present purpose to make a choice between the two classes of cases, one of which places a limited construction on section 85 and holds it to have been enacted for the benefit of the superior landlord, while the other places a wider construction upon the section and allows a stranger to avail himself of its provision to defeat the title of a grantee who had not obtained possession before or after the grant. Apart from the conflict on this point, there is no serious doubt as to two propositions, namely, *first*, that the title of a grantee, who can fall back upon prior possession as tenant or otherwise cannot be defeated by mere proof of contravention of section 85; and, *secondly*, that, as between grantor and grantee, the rule of estoppel applies when the elements essential to attract its operation are proved to exist. In the case before us, as we have already explained, the

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(1) (1912) 16 C. L. J. 144.

(3) (1910) 13 C. L. J. 649.

(2) (1913) 17 C. W. N. 468.

(4) (1914) 24 C. L. J. 539.

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defendants are precluded by the doctrine of estoppel from asserting that their obligations are other than those set out in the lease of the 27th August, 1896, on the strength whereof they obtained possession from their grantors. In this view, the decree of the Subordinate Judge cannot be supported.

We have finally to consider the question of the measure of damages. The defendants dispute only the first two items claimed by the plaintiffs. The first item must obviously be disallowed; the plaintiffs cannot claim the value of the property lost to them as also the sale proceeds which simply represent the property transformed into money. As regards the second item, the claim is clearly excessive. As between the plaintiffs and the defendants, the property may be deemed to be a tenure, but the only reliable evidence as to the market value of a permanent tenure, which comes from the side of the defendants, is that it sells for 13 years purchase. As the net profit derivable by the plaintiffs was Rs. 150 a year, the value cannot be estimated at a higher figure than Rs. 1,950. The appeal will consequently be allowed and the plaintiffs will have a decree for Rs. 4,318 with interest thereon at 6 per cent. per annum from the date of the institution of the suit to the date of realisation. The plaintiffs will also have their costs in proportion to the sum decreed, both here and in the Court below.

S. K. B.

Appeal allowed.

APPELLATE CIVIL.

Before Mookerjee and Cuming JJ.

NAWAB BAHADUR OF MURSHIDABAD

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June 22.

Bengal Tenancy Act (VIII of 1885) s. 109—Its scope and operation.

To attract the operation of section 109 of the Bengal Tenancy Act, it is essential to establish that the civil suit has for its subject a matter which has already formed the subject of an application under s. 105. The introduction of s. 105A has not altered the scope of s. 109 which must be construed on the same lines as before the introduction of s. 105A. It cannot be held under s. 109 that a matter has been the subject of an application under s. 105 whenever it might, if the defendant had so chosen, have been raised and decided under s. 105 read with s. 105A. To hold that would be to read into s. 109 words which are not there.

Pandab Dowari v. Ananda Kisun (1), *Sashi Bhusan v. Eshabar Ali* (2), *Sasi Bhusan Hazra v. Aswini Kumar Samanta* (3) referred to.

APPEAL by the Nawab Bahadur of Murshidabad, the defendant.

This appeal arose out of a suit for a two-fold declaration. The first prayer was for a finding and a declaration that (i) that the lands set forth in the 6 schedules appertain to six *mourasi-moqarrari raiyati* holdings of the plaintiffs; (ii) that they are not liable to enhancement of rent; (iii) that the decree obtained against them under section 105 be declared null and

* Appeal from Order, No. 569 of 1914, against the order of W. A. Seaton, District Judge of Murshidabad, dated Aug. 20, 1914, reversing the order of Chandra Bhusan Banerjee, Subordinate Judge of Murshidabad dated Feb. 25, 1914.

(1) (1910) 14 C. W. N. 897.

(2) (1915) 19 C. W. N. 636.

(3) (1912) 19 C. W. N. 637 (n).

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void on the ground that it was obtained by collusion (non-service) and suppression of notices. The second prayer was for a declaration that the lands be not treated in the manner disclosed in the record of-rights. That record, it was contended, disclosed a tenure in plaintiffs' names with a rent aggregating the rents of the holding set up by them as well as holdings comprising some land taken out of those holdings. The suit was dismissed by the Subordinate Judge on a preliminary finding that it was not maintainable in view of the Settlement Officer's decision in a suit under section 105 of the Bengal Tenancy Act. The plaintiffs then appealed to the District Judge who allowed the appeal and directed that the suit be tried. Hence this appeal by the 1st defendant to the High Court.

Babu Hemendra Nath Sen, Babu Sajani Kanta Sinha, Babu Mahesh Chandra Banerji, for the appellant.

Babu Panchanan Ghosh and Moulvi A. S. M. Akram, for the respondents.

MOOKERJEE AND CUMING JJ This is an appeal by the first defendant in a suit for a two-fold declaration; viz., *first*, that proceedings under Chapter X of the Bengal Tenancy Act, commenced at his instance, were fraudulent, *ultra vires*, and void; and, *secondly*, that, if the proceedings were not vitiated by fraud, the plaintiffs were *maurasi-moqarrari* raiyats in respect of the disputed lands (and not tenure-holders as entered in the record-of-rights), that the lands formed distinct raiyati tenancies (and not one tenure), and that the defendant landlord was not entitled to realise Rs. 84 which had been assessed by the Settlement Officer as fair rent under section 105 of the Bengal Tenancy Act. The suit was defended on the ground, amongst others, that

it was barred under section 109. The Court of first instance gave effect to this contention and dismissed the suit. Upon appeal, the District Judge has reversed that decision and has remanded the suit for trial on the merits. The present appeal is directed against this order of remand, and raises the question whether the suit is maintainable notwithstanding the provisions of section 109.

Section 109 provides that, subject to the provisions of section 109A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted, or proceedings taken, under sections 105 to 108 both inclusive. Before we determine the scope of section 109 and its effect when applied to the present suit, we may point out that the proviso to section 111A is of no assistance to the plaintiffs. That proviso applies only to a case where the record-of-rights has been framed in pursuance of an order made under section 101, sub-section (2), clause (d); that is, to a case where a settlement of land revenue is being or is about to be made; but in the case before us, the record of rights was prepared at the instance of the landlord under the provisions of section 101, sub-section (2), clause (4). Consequently, we have to determine how the suit is maintainable notwithstanding the provisions of section 109.

It is plain that in so far as the plaintiffs ask for a declaration that the proceedings under Chapter X were vitiated by fraud, section 109 does not present an effective bar. No question of fraud was the subject of the application under section 105; consequently, the suit, treated as a suit for relief on the ground of fraud, is maintainable. With regard to the alternative declaration, the applicants contend that as the question for determination might have been made the subject of

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controversy in the proceedings under section 105, they cannot be investigated in the present suit. In our opinion, there is no force in this contention. Section 105A, no doubt, authorises the Settlement Officer, in the course of proceedings under section 105 for the settlement of fair and equitable rent, to investigate questions which would otherwise be determined at the instance of the aggrieved party in a suit instituted under section 106. But in the case before us, no such question was raised or investigated in the proceeding under section 105. The reason assigned by the plaintiffs is that they were not apprised of the proceedings under Chapter X and consequently did not appear before the Settlement Officer. Whether the tenants were or were not aware of the proceedings under Chapter X, the fact remains that the matters now in controversy did not form the subject of investigation under section 105. Consequently, on a plain and literal reading of section 109, the position cannot be maintained that the present suit concerns a matter which has already been the subject of an application under section 105. The appellant, however, urges us to put a wider construction upon section 109. He contends that, as in a case where section 11 of the Code of Civil Procedure is applicable, a question which might and should have been raised is deemed to have been raised and decided, we should hold under section 109 that a matter has been the subject of an application under section 103. whenever it might, if the defendant had so chosen, have been raised and decided under section 105 read with section 105A. We are of opinion that this contention is unsound. If we were to accept the construction put forward by the appellant, we should have to read into section 109 words which are not to be found there; we cannot hold, on the analogy of the doctrine of constructive

res judicata, that the jurisdiction of the Civil Court has been constructively excluded even when a point has been neither raised nor decided under section 105 read with section 105A. In this connection, we may observe that sections 105 and 109 were inserted in the Bengal Tenancy Act, by the Bengal Act III of 1898. Section 105A was subsequently introduced into the Bengal Tenancy Act by section 26 of Beng. Act I of 1907. But though the scope of section 105 was thus widened and section 105A was included in section 109, the language of section 109 was left unaltered. If the Legislature had intended to adopt the view put forward by the appellant, the language of section 109, would no doubt have been suitably modified. As pointed out by this Court in a long line of cases, amongst them, in *Pandab Dowari Das v. Ananda Kisun*(1), *Sashi Bhusan v. Eshabar*(2), and *Sasi Bhusan Hazra v. Aswini K. Samanta*(3), to attract the operation of section 109, it is essential to establish that the civil suit has for its subject a matter which has already formed the subject of an application under section 105. These cases were decided before the introduction of section 105A into the Bengal Tenancy Act. But as the introduction of section 105A has not altered for our present purpose the scope of section 109, section 109 must now be construed on the same lines as before the introduction of section 105A. In this view, it is plain that in so far as the plaintiffs seek for a declaration that they are *mourasi-mukarari* raiyats and not tenure-holders and that the lands held by them constitute not one tenure but distinct raiyati holdings, the suit is clearly maintainable. These matters did not form the subject of determination under section 105; indeed, the Settlement Officer had enquired

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into the point at an antecedent stage, namely, when the record-of-rights was under preparation. The only matter for investigation in the proceedings under section 105 was the question of fair and equitable rent of the lands shown in the record-of-rights as held by the tenants as a tenure under their landlord. But in so far as the plaintiffs seek a declaration that the defendant is not entitled to realise Rs. 84 as rent in respect of the land in suit, the suit is clearly barred by section 109, for this question directly relates to a matter which had formed the subject of the application under section 105. This view is in accordance with that taken by this Court in the case of *Sheodhani Pandey v. Maharani Beni Pershad Koeri*(1). It is, consequently, superfluous to determine what the position of the plaintiffs will be, if they succeed in this litigation and obtain the other declaration which they seek. It is conceivable that in such a contingency, if, notwithstanding their success, the landlords institute a suit for rent against them on the basis of the determination under section 105, they may be met successfully by a plea which need not be elaborated for the purposes of this suit.

The result is that the prayer for a declaration that the defendants are not entitled to get the assessed amount of *jama* of Rs. 84 will be struck out from the plaint. Subject to this alteration, the order for remand made by the District Judge will stand. As the appeal has substantially failed, the appellant must pay the respondents their costs in this Court.

S. K. B.

(1) (1910) 16 C. L. J. 67.

CIVIL RULE.

Before Mookerjee and Cuming JJ.

J. C. GALSTAUN

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July 21.

Rateable Distribution—Civil Procedure Code (Act V of 1908) s. 73; O XXI, r. 65—Policy underlying the section—Receipt of purchase-money by agent, effect of.

The policy, which underlies s. 73 of the Code of Civil Procedure obviously is to fix the point of time when the entire body of persons entitled to claim rateable distribution should be finally ascertained; that point of time is the moment when the entire purchase-money has been paid by the purchasers. It is immaterial from this point of view whether the purchase-money has been actually paid into the Treasury or into the hands of a person employed by the Court to hold the sale.

When a sale has been held by a Court in execution, under Order XXI, r. 65, receipt of purchase money by the agent is, for the purposes of s. 73, equivalent to receipt of assets by the Court.

Golam Hossein v. Fatima Begum (1), *Maharaja of Burdwan v. Apurba Krishna Roy* (2) distinguished.

Huddersfield Banking Company, Ltd. v. Henry Lister & Son, Ltd. (3), *Wentworth v. Bullen* (4), *Crosskey v. Mills* (5), *Gray v. Haig* (6) referred to.

THIS was a rule to set aside an order made in a proceeding for rateable distribution under section 73 of the Code of Civil Procedure. It appears that one Md. Abbas obtained a decree against Sullivan on the basis of a petition of compromise which set out that

* Civil Rule No. 327 of 1916, against the order of Umes Chandra Chakrabarti, Subordinate Judge of 24-Parganas, dated March 27, 1916.

(1) 1910) 16 C. W. N. 394.

(4) (1829) 9 B. & C. 840.

(2) (1911) 14 C. L. J. 50.

(5) (1834) 1 C. M. & R. 298.

(3) [1895] 2 Ch. 273.

(6) (1855) 20 Beav. 219.

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the money decree will be a charge on the judgment debtor's moveables lying at 15, Circular Road, Ballygunj, and that the said properties should be sold through Mackenzie Lyall & Co., the auctioneers. Abbas assigned his decree to W. C. Bonnerjee who executed it. This W. C. Bonnerjee obtained another decree against the very same judgment-debtor on the Original Side of the High Court for Rs. 22,441 and odd annas. He got the said moveables attached on the basis of a precept sent by this Hon'ble Court to the District Judge and then applied for execution of his decree before the District Judge, having obtained a certificate from the High Court. This was done within two months of the attachment by precept. He then applied for sale through Mackenzie Lyall & Co., as arranged in Md. Abbas's decree. The Court accepted this arrangement. The moveable properties were sold by the auctioneers on the 21st and 22nd September 1915. Mr. Galstaun obtained his decree against the said judgment-debtor on the Original Side of the High Court on the 31st of August 1915.

At his instance this Court passed an attachment order over properties already attached at the instance of W. C. Bonnerjee. But this order was withdrawn and thereafter Mr. Galstaun obtained a certificate for execution of his decree here and filed his application on the 14th of March 1916. Mackenzie Lyall & Co. handed over the sale-proceeds to the Court on the 16th of March 1916. Mr. Galstaun urged before the Subordinate Judge that the sale-proceeds should be taken to have been realized on the 16th of March 1916. Therefore, he submitted that he was entitled to share in the sale-proceeds under section 73 of the Code of Civil Procedure, inasmuch he had obtained a certificate for execution of his decree here and had filed his application on the 14th of March 1916. The Subordinate

Judge rejected the application of Mr. Galstaun on the ground that the properties, being moveables, the price must have been realized on the dates of the sale, viz., 21st and 22nd September 1915. The application of Mr. Galstaun could not, therefore, be said to have been made before the receipt of assets.

Against this order Mr. Galstaun moved the High Court and obtained this Rule.

Mr. Zorab and Babu Bankim Chandra Mookerjee. for the petitioner.

The Advocate-General (Sir S. P. Sinha), Mr. C. C. Ghose and Babu Satish Chandra Mookerjee, for the opposite party.

MOOKERJEE AND CUMING JJ. We are invited in this Rule to set aside an order made in a proceeding for rateable distribution under section 73 of the Code of Civil Procedure. The sequence of events which led to the order in question, is really not in controversy and may be briefly stated. On the 23rd August 1915, one Bonnerjee, now opposite party in this Rule, obtained a decree for Rs. 22,441 against Sullivan on the Original Side of this Court. On the 26th August 1915, one Mahmad Abbas obtained a consent decree against Sullivan for Rs. 5,200 in the Court of the Subordinate Judge of the 24-Parganas. On the 31st August 1915, Galstaun, petitioner in this Rule, obtained a decree for Rs. 8,105 against Sullivan on the Original Side of this Court. On the 21st and 22nd September 1915, a considerable sum was realized by a sale of the moveable properties of the judgment-debtor held by Mackenzie Lyall & Co. under the orders of the Subordinate Judge. The question in controversy is, whether Galstaun is entitled to rateable distribution of the sale-proceeds. To appreciate the precise

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position of the rival claimants, we must examine in detail the proceedings taken for execution of the three decrees.

As regards the first decree, we find that a precept was, on the 24th August 1915, sent to the Court of the Subordinate Judge under section 46 of the Civil Procedure Code, and the moveable properties of the judgment-debtor were attached on that basis. On the 6th September 1915, an order was made by this Court for transfer of the decree to the Court of the Subordinate Judge of the 24-Parganas for execution. As regards the second decree, we find that Abbas applied for execution on the 8th September 1915. On that very day, an order was made for sale of the properties by Mackenzie Lyall & Co., but the proceeding thus initiated was dismissed on the 20th September, as Abbas had in the interval transferred the decree to Bonnerjee. On that very day, Bonnerjee made an application to execute the decree as assignee thereof. The sale previously mentioned was held by Mackenzie Lyall & Co. on the 21st and 22nd September 1915. As regards the third decree, we find that Galstaun was not able to obtain an order for transfer from this Court to the Court of the Subordinate Judge till the 15th December 1915 and his application for execution was not made before the Subordinate Judge till the 14th March 1916. Mackenzie Lyall & Co. sent a cheque to the Subordinate Judge on the 15th March 1916 for Rs. 12,637, the net proceeds in their hands. The question arises, whether, in these circumstances, Galstaun is entitled to obtain rateable distribution under section 73 of the Code of Civil Procedure.

The first sub-section of section 73 is in these terms :
 "Where assets are held by a Court and more persons than one have, *before the receipt of such assets*, made application to the Court for the execution of decrees

for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons." Two of the requisite elements are established in this case, namely, *first*, assets are held by the Court of the Subordinate Judge; and, *secondly*, each of the decree-holders has obtained a decree for payment of money against the same judgment-debtor and has not obtained satisfaction thereof. The question, consequently, reduces to this: who, among the rival claimants, did, before the receipt of the assets by the Court, make an application to the Court for execution of his decree? In the determination of this question, two points require consideration, namely, *first*, what was the true position of Mackenzie Lyall & Co. when they held the sale of the moveable properties on the 21st and 22nd September 1915; did they hold the sale as the Agents of the Court or as the Agents of the judgment-debtor Sullivan? *secondly*, was the receipt of money by the auctioneers equivalent to "receipt of assets by the Court" within the meaning of section 73 of the Code of Civil Procedure?

The determination of the first question depends upon the terms of the consent decree made in the suit between Abbas and Sullivan and the true significance of the proceedings taken for the enforcement of that decree. It is indisputable that the sale was held, not in execution of the first or the third decree, but in a proceeding on the basis of the second decree. Was the sale, then, held on the basis of the second decree by Mackenzie Lyall & Co., as in execution of that decree or was it held at the instance of the judgment-debtor and was in essence a private sale for his benefit alone? The answer depends upon the true construction of the consent decree, in which, as

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happens frequently, sufficient care was not taken to set out precisely the reliefs granted to the successful litigant. That decree, as we read it, provides that "the defendant Sullivan will sell through Mackenzie Lyall & Co. the whole of the furniture belonging to him, and, according to the terms of the compromise, will pay out of the net sale-proceeds the sum of Rs. 5,200 to the plaintiff; that if the net sale-proceeds be not sufficient to pay the whole of the said sum, the proceeds shall be paid in part payment of the said sum of Rs. 5,200 and the plaintiff will recover the balance from the defendant; that for the payment of the said sum of Rs. 5,200, the furniture or the net sale-proceeds thereof shall in the meantime be charged in the first instance with the payment of the said sum to the plaintiff." This decree clearly contemplated a sale in the first instance by the defendant himself through Mackenzie Lyall & Co., and payment by him to the decree-holder of the sum of Rs. 5,200, out of the net sale-proceeds. It was with reference to this aspect of the consent decree that, as soon as it was made, the Court instructed Mackenzie Lyall & Co. to sell the furniture. Difficulties, however, arose from the conduct of the judgment-debtor who was, for some unexplained reason, unwilling to proceed with the sale, and what had been contemplated by the decree was not carried out. The result was that, on the 8th September 1915, the decree-holder was driven to apply to the Court for execution and for an order upon Mackenzie Lyall & Co. to sell the moveables. This application was granted and an order was made as prayed. Whether such an order was or was not contemplated by the decree, it is not for us to determine in the present proceedings. But the fact remains that the Court issued instructions to Mackenzie Lyall & Co. to sell the furniture, and the correspondence between the Court

and the auctioneers indisputably shows that the auctioneers proceeded to sell the moveables of the judgment-debtor, not at his request but under the orders of the Court. Before the sale could actually be held, the decree had, however, been assigned by Abbas to Bonnerjee. Bonnerjee, as we have seen, thereupon applied for execution as assignee, under Rule 16 of Order XXI of the Code, and prayed that fresh instructions might be issued to the auctioneers to hold the sale of the moveables of the judgment-debtor. The Court held that such a step was unnecessary, obviously on the ground that instructions had already been issued to the auctioneers on the application for execution made by Abbas. The sale was then held on the 21st and 22nd September and a large sum of money was realized. It has been contended here that this was a sale held, not in execution at the instance of the Court, but rather at the instance of the judgment-debtor Sullivan pursuant to the agreement between him and his creditor Abbas. In support of this argument, reference has been made to the decision in *Golam Hossein Cassim v. Fatima Begum* (1). Stress has also been laid on the circumstance that the steps, contemplated by the Code of Civil Procedure, as necessary preliminaries to a valid sale held at the instance of the Court, were not taken in this case, because, the properties were not attached and the requisite notices were not issued. In our opinion, it is fairly clear, on the proceedings taken in their entirety, that the sale was held by the Court through the agency of the auctioneers. The employment of agents for the conduct of a sale of this description is clearly contemplated by rule 65 of Order XXI of the Code, which provides that, save as otherwise prescribed, every sale in execution of a decree shall be conducted by an

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officer of the Court or by *such other person as the Court may appoint in this behalf* and shall be made by public auction in the manner prescribed. In the present case, the person appointed by the Court, under Order XXI, rule 65, was no doubt the very person nominated by the parties at the time the consent decree was made. It is also true, as observed by Kay L. J. in the case of *Huddersfield Banking Company, Ltd. v. Henry Lister & Son* (1), that a consent order is a mere creature of agreement and carries out the agreement between the parties, or as Parke J. puts it in *Wentworth v. Bullen* (2), the contract is not the less a contract and subject to the incidents of a contract, because there is superadded the command of a Judge. But it is nevertheless an order of the Court and possesses one at least of the essential characteristics of an order made by a Court of justice, namely, it is an order capable of execution by the Court. In the case before us, the agreement of the parties that the moveable properties of the judgment-debtor would be sold by Mackenzie Lyall & Co. was accepted by the Court and embodied in the decree. The inference follows that when, upon the application of the judgment-debtor, the Court instructed Mackenzie Lyall & Co. to hold the sale, the Court took a step in execution and the sale was held in execution by a person appointed by the Court in that behalf. The decision of Fletcher J. in *Golam Hossein v. Fatima* (3), does not militate against this view and is clearly distinguishable; that case only rules that a sale by a receiver is not a sale by the Court for the purpose of grant of a sale certificate. That principle obviously has no application to the case before us. It may be

(1) [1895] 2 Ch. 273.

(2) (1829) 9 B. & C. 840.

(3) (1910) 16 C. W. N. 394.

added that if the sale here be treated as a private sale held at the instance of the judgment-debtor by an agent nominated by him, there would be no room for the application of section 73 of the Code of Civil Procedure and the application of Galstaun for rateable distribution could not possibly be entertained. On the first question, we must consequently hold that Mackenzie Lyall & Co. held the sale at the instance of the Court and that the sale was in essence a sale by the Court itself.

The determination of the second question involves the solution of the problem, whether receipt of the purchase-money by the auctioneers from the purchasers was equivalent to receipt of assets by the Court within the meaning of sub-section (1) of section 73 of the Code of Civil Procedure. We have been invited to answer this question in the negative, on the authority of the decision in *Maharaja of Burdwan v. Apurba Krishna Roy* (1). That case is of no assistance in the examination of the question raised before us. The sale there was of immoveable property. Under the provisions of the Code, upon such a sale, one-fourth of the purchase-money is required to be paid into Court at the time the bid is accepted; the remainder must be brought into Court by the purchaser within a prescribed time. The question in controversy, was, whether assets could be deemed to have been received by the Court within the meaning of section 73 before the entire purchase-money had been paid into Court. The answer was in the negative, for the obvious reason that till the entire purchase-money had been brought into Court, there was no completed sale on the basis whereof the sale-proceeds could be distributed amongst the rival claimants. It is also clear that rateable distribution in

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that case was sought, not in respect of the one-fourth share of purchase-money paid into Court at the time of the acceptance of the bid, but of the entire purchase-money; and with reference to a three-fourths share thereof at least, there could be no controversy that the assets were not received till such portion had been paid into Court. The case before us is of an entirely different description. Here, what was sold was moveable property and the entire purchase-money was paid by the purchasers into the hands of the auctioneers in one instalment. The question thus arises, whether the receipt of the purchase-money by the auctioneers was receipt of the assets by the Court. We are clearly of opinion that the answer must be in the affirmative. The policy which underlies section 73 obviously is to fix the point of time when the entire body of persons entitled to claim rateable distribution should be finally ascertained; that point of time is the moment when the entire purchase-money has been paid by the purchasers. It is immaterial, from this point of view, whether the purchase-money has been actually paid into the Treasury or into the hands of a person employed by the Court to hold the sale. This view is consistent with the elementary principle that when an auctioneer receives the purchase-money as agent of the vendor, it is his duty immediately to account for it and pay over the balance due to the latter. This is in conformity with the decisions in *Crosskey v. Mills* (1) and *Gray v. Haig* (2). We hold, accordingly, that the assets in the present case were received by the Court for purposes of section 73 on the 22nd September 1915 and not on the 15th March 1916, when the cheque was sent by the auctioneers. It is not necessary for us to enunciate a general principle of universal application that receipt of money by an agent is, in all

(1) (1834) 1 C. M. & R. 298.

(2) (1855) 20 Beav. 219.

conceivable circumstances, equivalent to receipt of money by the principal. It is sufficient to hold that when a sale has been held by a Court in execution, under Order XXI, r. 65, receipt of purchase-money by the agent is, for purposes of section 73, equivalent to receipt of assets by the Court. In this view, it is plain that the assets were received by the Court, before Galstaun applied for execution of his decree.

We desire to add that the view we take is clearly consistent with the broad justice of the case. It has been conclusively proved that the delay in the transmission of the purchase-money by the auctioneers to the Court was due entirely to the action of Galstaun himself. He made an application to this Court on the Original Side with a view to restrain the auctioneers from transmitting the sale-proceeds to the Court of the Subordinate Judge. He obtained an *ex parte* order to this effect on the allegation that the money was held by them within the jurisdiction of this Court, as agents of his judgment-debtor, Sullivan. The Court was subsequently apprised that the *ex parte* order had been obtained on suppression of the fact that the money was in the hands of the auctioneers, not as the agents of Sullivan but as the agents of the Court of the Subordinate Judge, who had directed the sale. The result was that the order was forthwith recalled, and the auctioneers transmitted the cheque to the Subordinate Judge without delay. The parties should clearly be placed in the position they would have occupied if the erroneous order had never been made. It would, in our opinion, have been lamentable if, in such circumstances, we were constrained, upon a narrow construction of section 73, to hold that the petitioner had by recourse to a device succeeded in detaining the money in the hands of the auctioneers for several months and thereby securing an advantage to

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which he would not otherwise be entitled under the law.

The result is that this Rule is discharged with costs.

S. K. B.

Rule discharged.

APPELLATE CIVIL.

Before N. R. Chatterjee and Sheepshanks JJ.

DURGA PRASANNA ROY

v.

ISHAN CHANDRA SHAHA.*

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 Aug 29.

Common Manager—Bengal Tenancy Act (VIII of 1885), s. 95—Suit for general account after release of estate.

Where a Common Manager appointed under s. 95 of the Bengal Tenancy Act resigned and the estate was released, and where it was found that his account had not been properly rendered and passed by the District Judge:—

Held, that he could be sued for account with the permission of the District Judge.

Nab i Kishore Mandal v. Atul Chandra Chatterji (1) distinguished.

SECOND Appeal by the plaintiff, Durga Prasanna Roy.

This appeal arises out of a suit for accounts brought by the plaintiff, Durga Prasanna Roy, against the defendant No. 1 Ishan Chandra Shaha and others. The plaintiff was one of the co-sharers of a joint estate of which the defendant No. 1 was appointed common manager under section 95 of the Bengal Tenancy Act. The said defendant No. 1 took up the duties of a

* Appeal from Appellate Decree, No. 2367 of 1913, against the decree of Haridas Bose, Offg. Subordinate Judge of Pabna, dated April 23, 1913, reversing the decree of Phani Bhusan Bauerji, Munsif of Pabna, dated April 27, 1912.

common manager from the 22nd March 1907 and continued as such up to the 3rd June 1910. On or about the last mentioned date certain charges were made against the common manager before the District Judge, which it is unnecessary to recapitulate for the purposes of this report. As a result thereof the common manager had to resign his post on the 4th June 1910. The estate was released on the 30th November 1910. Permission is alleged to have been given to the proprietors to sue the common manager for accounts after the release of the estate. The plaintiff, thereupon, with the other co-sharers sued the said defendant No. 1 for accounts.

The Court of first instance decreed the suit. On appeal, the lower Appellate Court dismissed the suit, holding that the permission necessary for a suit of this nature did not extend to the appellant; that the suit was not maintainable, for the reason that the accounts of the defendant had already been regularly checked and passed in the office of the District Judge. From this decision the plaintiff preferred this appeal to the High Court.

Babu Braja Lal Chuckerburty, for the appellant.

Babu Mahendranath Roy and *Babu Jogendranath Mozumdar*, for the respondents.

Babu Biraj Mohan Majumdar, for the infant respondent.

Cur. adv. vult.

N. R. CHATTERJEA AND SHEEPSHANKS JJ. In the case out of which this appeal arises, the plaintiff, one of the co-sharers in an estate for which a common manager had been appointed under section 95 of the Bengal Tenancy Act, sued the common manager for accounts after the release of the estate. The Court of first instance gave him a preliminary decree for

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accounts, but the lower Appellate Court has dismissed his suit, holding that the permission necessary for a suit of this nature had not been given by the District Judge, and also that the suit was not maintainable, for the reason that the accounts of the defendant had already been regularly checked and passed in the office of the District Judge. These two findings are challenged on second appeal.

As regards the former, the appellant relies on an order passed by the District Judge in releasing the estate, which runs "permission to sue the common manager is granted." He contends that this permission extends to all the co-sharers, himself included. The respondent on the other hand argues that, because the proceedings in the course of which this order was made originated with a petition presented by certain individual co-sharers, the permission must be held to be restricted to them alone, and that the plaintiff not having been one of them is not entitled to sue. In our opinion the contention of the appellant must prevail.

All the co-sharers were made parties to the proceeding in question; all of them had an equal interest in suing the common manager if there appeared to be grounds for so doing; the permission given is not restricted either to any individual co-sharers or to all the co-sharers suing jointly, and anyone or more of the co-sharers were therefore entitled to avail themselves of it. The permission was clearly intended to remove altogether the bar which without it would have stood in the way of any suit, such as the present one, being brought against the common manager.

As regards the second point, the lower Appellate Court has relied on *Naba Kishore Mandal v. Atul Chandra Chatterji* (1). The facts, however, of that

case are entirely different from those of the present one. In the former it was found that objections had been put into the accounts filed, and that after those objections had been considered and disposed of, the accounts were passed by the District Judge. In the present case there is nothing to show that the accounts were passed by the District Judge except a general statement to that effect, giving no details as to the manner in which they were passed, in the evidence of the defendant No. 1 himself. That they were not in fact passed in any sense in which the term can properly be used is made perfectly clear by the evidence of the defendant No. 1 himself, from which it appears that two gentlemen in succession were specially appointed to check them, that the former of them returned them without being able to complete his check, and the latter conducted an enquiry into them for 2 or 2½ months, also without any definite result, and that the defendant No. 1 was suspended for delay in submitting his budget. It is further made clear by the fact that the District Judge, having these accounts and the result of the two enquiries before him, granted the permission to sue in general terms, without excepting any portion of the period for which accounts had been filed. We, therefore, hold that the authority above referred to has no application to the facts of the present case, and that the lower Appellate Court was mistaken in holding that the plaintiff was not entitled to sue for a general account.

The result is that the appeal succeeds. The decree of the lower Appellate Court is set aside, and that of the Court of first instance is restored. Costs will abide the result.

L. R.

Appeal allowed.

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APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C.J. and Mookerjee J.

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Nov. 16.

BUDHU LAL

v.

CHATTU GOPE.*

Appeal, right of—Sanction for prosecution refused by the Presidency Small Cause Court—High Court, revisional jurisdiction of—Appeal from order of single Judge sitting on Original Side made in exercise of such jurisdiction—Nature of trial—"Judgment"—Civil Procedure Code (Act V of 1908), s. 115—Criminal Procedure Code (Act V of 1898), s. 195 (6)—Letters Patent (1865), cl. 15.

Sanction to prosecute the plaintiff in a civil suit in the Presidency Small Cause Court for making a false claim and for making a false statement in an application for leave to institute a suit, was refused by a Judge of that Court. The defendant, thereupon, applied to the Original Side of the High Court for a reversal of the order and obtained an order of remand to the Small Cause Court Judge. The plaintiff having appealed against this order of remand :—

Held, that the order appealed against was a "judgment" within the meaning of clause 15 of the Letters Patent, and that there was a right of appeal.

The Justices of the Peace for Calcutta v. The Oriental Gas Company (1) referred to.

Held also, that in every case where the Court is called upon to decide whether the decision under appeal is or is not a "judgment" within the meaning of clause 15 of the Letters Patent, regard must be had to the nature and the contents of the order.

Ebrahim v. Fakhruddin Begum (2), *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Muhomed Hadjee Jousub* (3), *Rami Aiyar v. Venkatachella Padayachi* (4) and *Mathura Sundari Dasi v. Haran Chandra Saha* (5) referred to.

* Appeal from Original Order No. 12 of 1916.

(1) (1872) 8 B. L. R. 433.

(3) (1874) 13 B. L. R. 91.

(2) (1878) I. L. R. 4 Calc. 531.

(4) (1907) I. L. R. 30 Mad. 311.

(5) (1915) I. L. R. 43 Calc. 857.

APPEAL by Budhu Lal, the plaintiff, from an order of Chaudhuri J.

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On the 5th August, 1913, Budhu Lal on behalf of another person instituted in the Presidency Small Cause Court seven suits for moneys lent, against one Chattu Gope and others. The suit against Chattu Gope was for the recovery of the sum of Rs. 196-14 for principal and interest alleged to have been lent him on a promissory note in Calcutta on the 25th September, 1911. Inasmuch as all the defendants were residing beyond the jurisdiction of the Small Cause Court, leave to institute the suits was applied for and granted to the plaintiff on the statements made in the verifications contained in each of his applications and solemnly affirmed by him, that the money was lent in Calcutta and was payable in Calcutta. These seven suits, together with twenty-four others between a different plaintiff against different other defendants were fixed for trial by the 3rd Judge of the Small Cause Court. When the suits came on for hearing on the 23rd March, 1914, the plaintiffs' pleader on behalf of his clients offered to be bound by the mere denial by the defendants of the plaintiffs' claims in each of the cases separately without any further evidence or at all going into the merits of the cases, provided that such denials were made on a special form of oath, which consisted in the defendant repudiating the plaintiff's claim while facing the river Ganges. Upon each of the defendants accepting this challenge and making his denial of the plaintiff's claim against him in the manner aforesaid, all the suits were dismissed. On the 21st December, 1914, the defendants applied to the Court of Small Causes for sanction to prosecute the plaintiffs under section 195 of the Criminal Procedure Code for offences punishable under sections 193 and 209 of the Indian Penal Code, and notices were

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ordered to be issued, returnable on the 30th January, 1915. On the 23rd January, 1915, some of the applications were withdrawn and an order was obtained extending the returnable date to the 6th March, 1915. At the hearing some more applications were withdrawn and by consent it was agreed that the judgment in Chattu Gope's application would govern all the remaining applications. The Small Cause Court Judge refused sanction on the grounds that the application had not been made promptly as it ought to have been done, nor had the delay been satisfactorily accounted for and, further, that the application for leave to sue was not an application in a judicial proceeding. The defendant then applied, under section 115 of the Civil Procedure Code, to Mr. Justice Chaudhuri sitting singly on the Original Side of the High Court, for a Rule on the plaintiff to show cause why the order refusing sanction to prosecute him should not be set aside, or why an enquiry should not be directed in order to grant such sanction. At the hearing of the Rule the defendant explained the delay in applying for sanction in an affidavit: Mr. Justice Chaudhuri came to the conclusion, that it would have been more appropriate to have headed the application under the Criminal Procedure Code, than to have headed it "In the matter of section 115 of the Code of Civil Procedure," that the application for leave to sue was a stage in a judicial proceeding and that there was no reason to doubt the facts placed before him explaining the delay, though it would undoubtedly have been better if such explanation had been given before the learned Judge, before whom the application had been originally made. His Lordship accordingly directed, that formal amendment of the heading, if necessary, be made, and further directed, that an enquiry be held by the learned Judge as to whether

sanction should be given upon the materials placed before the Court, and that if upon such enquiry it be found that the allegations were false and leave to sue was improperly obtained, sanction should be given to the Crown to prosecute the plaintiff. The plaintiff, thereupon, appealed.

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The Standing Counsel (Mr. B. C. Mitter), for the respondent, took the preliminary objection that no appeal lay from the order of Mr. Justice Chaudhuri, as his Lordship had not decided anything on the merits, but had simply sent the matter back to the Small Cause Court to be determined according to law. He submitted that the Small Cause Court Judge had held that the application for leave to sue was not made in any stage of a judicial proceeding. On this ground, as also on the ground that the respondent had delayed in making his application for sanction without having satisfactorily accounted for such delay, the sanction was refused. Mr. Justice Chaudhuri had determined nothing. He did not order that sanction should issue. What he said was simply that the application for leave to sue was made in a stage of a judicial proceeding and sent back the matter to the Small Cause Court to be determined according to law. This order of Mr. Justice Chaudhuri was not appealable. Had Mr. Justice Chaudhuri given sanction this would not have been a determination of a right between the parties. It would have simply removed the bar. His order would then have been appealable under s. 15 of the Letters Patent, but it might possibly have been under s. 195 of the Criminal Procedure Code. Sections 193 and 195 of the Criminal Procedure Code and the definition of "judicial proceeding" in s. 4 cl. (m) of that Code were referred to. The order of remand was not a "judgment" under cl. 15 of the

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Letters Patent. In one sense it might be said that every pronouncement by a Judge sitting in a judicial capacity was a 'judgment,' and the contention might be raised that Mr. Justice Chaudhuri had given a decision which affected the merits of the question, inasmuch as he had held that sanction could be given in this case, but the present order of remand clearly did not amount to a judgment as contemplated by cl. 15 of the Letters Patent. It did not finally determine the rights between the parties. In support of this contention the case of *The Justices of the Peace for Calcutta v. The Oriental Gas Company* (1) was relied on. In every case there must always be an investigation of some right in issue before the Court, but in every case such investigation would not always finally determine the rights. Where a vital issue has been rejected there would be no appeal from such an order of rejection. The parties would have to wait till the whole case was over and they would have the right to appeal after the final order was passed.

[MOOKERJEE J. referred to *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (2).]

That case did not enlarge the definition of judgment or go beyond the case of *Justices of the Peace for Calcutta v. The Oriental Gas Company* (1). It was only another illustration. See the definition of "judgment" in *Ebrahim v. Fuckhrunnissa Begum* (3) in the judgment of Garth, C. J. The case of *Mathura Sundari Dasi v. Haran Chandra Saha* (4) dealt with most of the cases on ch. 15 of the Letters Patent.

As to the nature of an order granting sanction, see *In re an Attorney* (5).

(1) (1872) 8 B. L. R. 433, 452.

(3) (1878) I. L. R. 4 Calc. 531.

(2) (1874) 13 B. L. R. 91.

(4) (1915) I. L. R. 43 Calc. 857.

(5) (1913) I. L. R. 41 Calc. 446.

As to whether this was a proceeding of a criminal nature, see the observation by the Privy Council in *In the matter of an Attorney* (1). The other view was accepted by many judges and Pugh, J., in a considered judgment in *Ramadhin Bania v. Sewbalak Singh* (2), held that it was a civil trial. It was, therefore, a matter of some importance which Court should hear appeals against an order under s. 195 of the Criminal Procedure Code and how such proceedings should be instituted.

Mr. K. N. Chaudhuri, for the appellant, referred to the cases of *Shew Prasad Bungshidhur v. Ram Chandra Haribux* (3), *Tuljaram Row v. Alagappa Chettiar* (4) and *Padmabati Dasi v. Rasik Lal Dhar* (5).

[SANDERSON C.J. We will not trouble you on the preliminary point.]

The Standing Counsel did not reply.

SANDERSON C. J. In this case the learned Standing Counsel has taken a preliminary point that there is no right of appeal.

The position is as follows. An application was made in the Small Cause Court of Calcutta on behalf of the defendant, for sanction to prosecute the plaintiff under section 209 of the Indian Penal Code for having fraudulently and dishonestly with intent to injure and annoy the defendant made a claim which he knew to be false, and also under section 193 of the Indian Penal Code for having in an application for leave to institute a suit knowing and intentionally made a false statement when legally bound to state the truth. One of the learned Judges of the Small Cause Court refused the sanction basing his judgment upon two grounds. The first was that

(1) (1914) 18 C. W. N. ciii (Notes). (3) (1913) I. L. R. 41 Calc. 323.

(2) (1910) I. L. R. 37 Calc. 714. (4) (1910) I. L. R. 35 Mad. 1.

(5) (1909) I. L. R. 37 Calc. 259.

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the statements were not made in the course of a judicial proceeding, and the second was that there had been undue and unreasonable delay in making the application. The statement referred to was made upon affirmation upon an application for leave to sue certain persons who were outside the jurisdiction of the Small Cause Court. The application having been refused, a further application—I use this word advisedly and do not use the word appeal—was made to Mr. Justice Chaudhuri alleging that the decision of the learned Judge of the Small Cause Court was wrong, and that sanction ought to have been granted. The learned Judge came to the conclusion that the statement had been made in the course of a judicial proceeding, and that the delay had been explained: and he made an order that the matter should be further investigated by the learned Judge of the Small Cause Court and that that Judge should determine, upon the materials placed before the Court and, having regard to Mr. Justice Chaudhuri's decision, whether or not sanction should be granted. Against that decision the plaintiff Budhu Lal has appealed. Thereupon, as I have already stated, the learned Standing Counsel took a preliminary objection that there was no appeal, on the ground that the order made by Mr. Justice Chaudhuri was not a "judgment" within the meaning of clause 15 of the Letters Patent. I do not think that I need dwell at length upon one point to which reference was made by the learned Standing Counsel, because he did not really to my mind seriously urge it. I do not think it can be said that this was an order made in a criminal trial within the meaning of the words in clause 15. The point that the learned Standing Counsel earnestly argued is that it is not a "judgment" within the meaning of that clause.

Now, the definition of the word *judgment* relied

upon is that contained in the learned Chief Justice Couch's judgment in the well-known case of *Justices of the Peace for Calcutta v. The Oriental Gas Company* (1). The passage (which is at page 452) is this: "We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined." Now, there have been numerous cases dealing with this point, and I think I am right in saying that the definition given by the learned Chief Justice has never been regarded as absolutely exhaustive, and whenever this point is taken, the Court has to make up its mind whether the particular order in question is a *judgment* within the meaning of clause 15, having regard to the nature of the order. In my judgment, the order which was made in this case by the learned Judge is a *judgment* within the meaning of clause 15. Therefore, there is a right of appeal.

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Let me state quite shortly how the matter appears to my mind: Two points were taken before the learned Judge. The first of them was that the statements relied upon were made in the course of a judicial proceeding. The second was that although there had been delay, that delay could be and was explained away.

As regards the second point, the learned Judge thought that there was an explanation of the delay.

As regards the first point, he came to the conclusion and decided that the statements were made in the course of a judicial proceeding. Now, was not that a

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question which was between the parties? Certainly it was. The plaintiff was alleging, on the one hand, that the statements were not made in the course of a judicial proceeding; the prosecution, on the other hand, was alleging that they were made in the course of a judicial proceeding. It may be said that this was the main question between the parties. If the learned Judge had come to the conclusion that the statements were not made in the course of a judicial proceeding, that would have put an end to the matter, and the application would have been dismissed. This case, therefore, comes within the exact words of the learned Chief Justice Couch when he said—"It means a decision which affects the merits of the question between the parties by determining some right or liability."

Of the other cases which have been referred to, one is *Ebrahim v. Fackhrunniss Begum* (1) which is a decision of Chief Justice Garth. He says, "I think that the word 'judgment' means a judgment or decree which decides the case one way or the other in its entirety, and that it does not mean a decision or order of an interlocutory character which merely decides some isolated point, not affecting the merits or result of the entire suit." As I have pointed out, the decision of the question as to whether the statements were made in the course of a judicial proceeding, was one which affected the merits or result of the entire matter, for if it had been decided in one way, viz., in favour of the applicant's contention it would have put an end to the proceeding altogether.

For these reasons I think that the order appealed against is a "judgment" within the meaning of clause 15 of the Letters Patent, and that there is a right of appeal.

MOOKERJEE J. I agree that the appeal is competent and that the preliminary objection must be overruled.

The appeal is directed against an order of Chaudhuri J., which purports to have been made under clause (6) of section 195 of the Criminal Procedure Code. The appellant instituted a suit against the respondent in the Court of Small Causes at Calcutta. The defendant entered appearance: but at the trial the plaintiff made no attempt to prove his claim, with the result that the suit was dismissed. An application was subsequently made on behalf of the defendant for sanction to prosecute the plaintiff under section 195 of the Criminal Procedure Code for offences punishable under sections 193 and 209 of the Indian Penal Code. The Small Cause Court Judge dismissed the application for sanction, principally on the ground that no offence had been committed, because a statement made on oath in the course of a proceeding for leave to sue is not a statement made in a judicial proceeding. The defendant thereupon applied to Chaudhuri J., under section 195 (6), for reversal of this order of the Small Cause Court Judge. Chaudhuri J., came to the conclusion that the statement mentioned must be deemed to have been made in the course of a judicial proceeding and that consequently the order of the Small Cause Court could not be sustained. He did not, however, forthwith grant sanction to prosecute the plaintiff under section 195, but directed the Small Cause Court Judge to hold an enquiry and to pass such orders as might seem fit and proper, on the result thereof. The appeal is directed against this order.

The contention of the respondent is that the decision of Chaudhuri J., is not a "judgment" within the meaning of clause 15 of the Letters Patent.

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That clause, in so far as it is material for the purposes of the present case, provides that "an appeal shall lie to the High Court from a judgment, not being a sentence or order passed or made in any criminal trial, of one Judge of the said High Court." It is obvious that the order in question cannot in any sense be described as a sentence passed or order made in any criminal trial by one Judge of this Court. The proceeding before Chaudhuri J., fell within the scope of section 195 (6) and although of a criminal nature [*In re an Attorney* (1), *In the matter of an Attorney* (2)], was plainly not "a criminal trial": *Chakrapani Aiyangar v. King-Emperor* (3). The question, accordingly, arises, whether the decision was a "judgment."

Reference has been made to the definition given by Sir Richard Couch C. J., in the case of *The Justices of the Peace for Calcutta v. The Oriental Gas Co.* (4): "Judgment in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory. The difference between them is that a final judgment determines the whole case or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined." According to this definition, the circumstance that the order directs an enquiry and is consequently of a preliminary or interlocutory character, does not show that it is not a "judgment." The true question in controversy thus is, whether the decision affects the merits of the question between the parties by determining some right or liability. Now, the appellant is liable to be prosecuted only after sanction has been granted

(1) (1913) I. L. R. 41 Cal. 446.

(2) (1914) 18 C. W. N. ciii (Notes).

(4) (1872) 8 B. L. R. 433.

(3) (1902) 1 Weir 787 ;
 12 Mad. L. J. 408.

under section 195 of the Criminal Procedure Code for offences within the scope of sections 193 and 209 of the Indian Penal Code, if the statement imputed to him may rightly be held to have been made in the course of a judicial proceeding. The Small Cause Court Judge took a view favourable to him; Chaudhuri J., has expressed a contrary opinion. It is clear to my mind that in these circumstances the decision does affect the merits of the question between the parties by determining liability. It is not necessary for our present purpose to refer to the numerous judicial decisions which embody an attempt to define or elucidate the meaning of the term judgment as used in clause 15 of the Letters Patent, and which were analysed by me in the case of *Mathura Sundari Dasi v. Haran Chandra Saha* (1); but I desire to emphasise this point that the definition given by Sir Richard Couch, while it furnishes a useful test, is not a statutory definition and cannot be deemed inflexible and exhaustive. In every case where the Court is called upon to decide whether the decision under appeal is or is not a *judgment* within the meaning of clause 15 of the Letters Patent, regard must be had to the nature and the contents of the order. It may not be easy to reconcile all the reported decisions, on their special facts, or to draw a dividing line between different classes of cases, such as *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (2) and *Ebrahim v. Fuckhrunnissa Begum* (3). But the present case is reasonably free from difficulty and I entertain no doubt that the appeal is competent [*cf. Rama Aiyar v. Venkatachella Padayachi* (4)].

O. M.

*Preliminary objection overruled.*Attorney for the appellant: *Sailendra Mohan Dutt.*Attorney for the respondent: *J. T. Hume.*

(1) (1915) I. L. R. 43 Calc. 857.

(3) (1878) I. L. R. 4 Calc. 531.

(2) (1874) 13 B. L. R. 91.

(4) (1907) I. L. R. 36 Mad. 311.

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APPEAL FROM ORIGINAL CIVIL.*Before Sanderson C.J. and Mookerjee J.*

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Sanction for Prosecution—High Court, Jurisdiction of—Practice—Procedure—Suit in the Presidency Small Cause Court—Statement made in the course of a judicial proceeding—Sanction refused by Presidency Small Cause Court—Revision by single Judge sitting on the Original Side of High Court—Remand—Powers of the Chief Justice to remit case for retrial by Division Bench of High Court.—Civil Procedure Code (Act V of 1908) s. 115—Criminal Procedure Code (Act V of 1898), ss. 195(6) and (7) (c), 435 and 439—High Court Rules, Appellate Side, Chapter II, rule V.

The assistance of a Judge of a High Court can, in a matter of sanction to prosecute from the Presidency Small Cause Court, be invoked only under s. 195(6) of the Criminal Procedure Code. Under that provision the only order which such a Judge is competent to pass is to revoke a sanction given or grant a sanction refused by the Subordinate Court. He has no jurisdiction to remand the case to the Small Cause Court for further enquiry. Under the Rules of Court (Chap. II, Rule V) he would have such jurisdiction if this were a matter under s. 115 of the Civil Procedure Code, but as it falls within s. 195(6) of the Criminal Procedure Code, it can be decided only by a Judge or Judges to whom it may have been allocated by the Chief Justice. The Judge exercising jurisdiction under s. 195(6) of the Criminal Procedure Code is competent to take additional evidence to enable him to decide whether he should confirm or reverse the order of the subordinate Court.

APPEAL by Budhu Lal, the plaintiff.

The facts are fully stated in the immediately preceding report of this case on the preliminary objection that this appeal was incompetent.

* Appeal from Original Order No. 12 of 1916.

Mr. K. N. Chaudhuri, for the appellant. There were not sufficient materials before Chaudhuri J. for making the order of remand. In all cases of perjury it was a well established rule that when there was no oath, there could be no conviction. One had to go back to the point whether there were materials before the lower Court to justify the refusal of sanction. Chaudhuri J. had no power to make the order for enquiry under s. 195 of the Criminal Procedure Code. He could either grant sanction, or affirm the lower Court's order.

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Furthermore, there had been unnecessary delay and this was a good ground for dismissing the application for sanction. The explanation of the delay before Chaudhuri J., was not sufficient and valid.

The Standing Counsel (Mr. B. C. Mitter), for the respondent. It has been uniformly held that such applications as this could be made under s. 115 of the Civil Procedure Code: *Ramadhin Bania v. Sewbalak Singh* (1). The fact that Chaudhuri J. made the order under s. 195 of the Criminal Procedure Code, made no difference to the general practice: *Tribeni Sahu v. Bhagwat Bux Rai* (2). The Court had powers of interference both under s. 115 of the Civil Procedure Code and under s. 195 of the Criminal Procedure Code.

Mr. K. N. Chaudhuri, in reply. As regards the delay, no satisfactory explanation was given and the respondent would be prejudiced in his defence if the matter must be enquired into after so long. This was a *quasi* criminal matter and the grounds for making the application should have been distinctly and sufficiently stated: see *Shashi Kumar Dey v. Shashi Kumar Dey* (3). The view of the Small Cause Court

(1) (1910) I. L. R. 37 Calc. 714. (2) (1907) 6 C. L. J. 298.

(3) (1892) I. L. R. 19 Calc. 345.

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Judge in refusing the application for sanction should be accepted.

[MOOKERJEE J. referred to *Rama Aiyar v. Venkatachella Padayachi* (1) and *Krishna Reddy v. Emperor* (2)].

The Standing Counsel submitted that the Court, whether in criminal or civil cases, for the purposes of justice, had inherent power to invent its own procedure. Section 428 of the Criminal Procedure Code and Order XLI r. 23 of the Civil Procedure Code and the cases thereon in Mulla's Edition were referred to. Those cases laid down that the power of remand was an inherent power and was not inconsistent with the Statute. Chaudhuri, J., might have referred the case to the Small Cause Court or taken evidence himself.

Cur. adv. vult.

SANDERSON C. J. This is an appeal from the decision of Chaudhuri J., given on the 6th October 1915 whereby he directed that an enquiry should be held by one of the learned Judges of the Small Cause Court as to whether sanction should be given to prosecute one Budhu Lal, the plaintiff in the Small Cause Court suit and the appellant in this Court, upon the materials placed before that Court, and whether the grounds upon which the jurisdiction of the Court was invoked when leave was asked for to institute the said suit No. 1592 of 1913, are true or untrue.

We have already disposed of the preliminary point taken by the learned Standing Counsel and held that an appeal lay from the decision of Chaudhuri J.*

We have now to decide the appeal on the merits.

I have already sufficiently stated the facts in giving judgment on the preliminary point and I need not

(1) (1907) I. L. R. 30 Mad. 311. (2) (1909) I. L. R. 33 Mad. 90.

* See *ante* p. 804.

repeat them. The first point which arises is, whether the learned Judge had jurisdiction to make the order in the form to which I have already referred

The application was headed "In the matter of section 115 of the Code of Civil Procedure," but the learned Judge at the hearing suggested that it would be more appropriate if it were made under the Criminal Procedure Code, and in fact the learned Standing Counsel treated it as such an application—and the learned Judge purported to make the order under section 195 of the Criminal Procedure Code.

The Small Cause Court being subordinate to this Court, it is clear that this Court had jurisdiction under section 195 (6) of the Criminal Procedure Code to deal with the application but, in my judgment, it is equally clear that under this section there was no power in the learned Judge to remand the case to the Small Cause Court for further enquiry. Under this section the sole power given to this Court is to revoke a sanction given or grant a sanction refused by the Subordinate Court, and therefore, in my judgment, the order made in the form already referred to, which amounted to a remand for further enquiry and decision by the Small Cause Court, cannot be upheld. This was not really disputed by the learned Standing Counsel; but he urged that such an order could be supported by reference to section 115 of the Civil Procedure Code. As regards this point, it must be remembered that the proposal of the learned Judge to deal with this application under section 195 of the Criminal Procedure Code was adopted on behalf of the applicant, and, in my judgment, it would not be right for us in a case of this kind, which is of a criminal nature, to allow the applicant, who is really the C. I. D., to shift his ground again even if we had power to act under section 115 of the Civil Procedure Code.

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The ordinary rule of this Court is that it will not interfere and exercise its powers under section 115 of the Civil Procedure Code if the aggrieved party has other remedy available, though it may do so in exceptional cases.

There being the remedy provided by section 195 of the Code of Criminal Procedure, I do not think it would be right for us under the circumstances of this case, even if we have jurisdiction so to do, to exercise the powers given to the Court under section 115 of the Civil Procedure Code.

It must, therefore, be considered what order should be made in this case.

It has been decided by Chaudhuri J. that the learned Judge of the Small Cause Court was wrong in holding that the application for leave to sue was not a stage in a judicial proceeding, and I concur in Chaudhuri J's. judgment. He held further that the delay in making the application had been explained to his satisfaction : I see no reason to differ from his decision on this question of fact.

The circumstances of the case were certainly remarkable, so far as the facts, which we have before us, indicate.

The plaintiff instituted (it is said on behalf of another person) seven suits in the Small Cause Court against Chattu Gope (the petitioner before Chaudhuri J.) and others. The case against Chattu Gope being based on a promissory note alleged to have been given in respect of money advanced by the plaintiff at the request of a third person and to have been executed by Chattu Gope in Calcutta in September 1911. Chattu Gope and the other defendants in these suits being resident outside Calcutta, the plaintiff Budhu Lal made applications for leave to sue and swore that the money was lent in Calcutta and payable in Calcutta.

When the cases came on for trial, neither the plaintiff nor the alleged other person gave any evidence themselves or produced any witnesses, but agreed to abide by the defendants' denial on oath of their liability. No decision has been given on the merits of the application for leave to prosecute, and under the circumstances of the case, in my judgment, it is desirable that such a decision should be arrived at by this Court; and the proper course will be to remit the application to a Division Bench, and as Chief Justice I determine, as I have power to do, that the case shall be remitted to Teennon and Chaudhuri JJ. By this course I hope further delay will be prevented. The question remains whether on the hearing the application will be confined to the materials which were before the Small Cause Court, or whether the Court will have power to take evidence. I should be sorry to be compelled to hold that the Court had no power to take evidence on such an application as this. If I was compelled so to hold, unfortunate results might happen: it might happen that the Judge of a subordinate Court might decide to refuse sanction to prosecute on a point of law without giving the accused person an opportunity of being heard on the merits. Upon an application under section 195 of the Criminal Procedure Code, the High Court might decide (as it did in this case) that the judgment of the Subordinate Court on the point of law was wrong, and the Court would then have to decide whether sanction to prosecute should be granted. In such a case it would be a great hardship on the accused person if he were debarred from giving his explanation before the High Court, especially as the Judge of that Court under section 195 could not remand the case for further enquiry and decision.

In my judgment, the learned Judges can take evidence as to the merits of the application. In fact,

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evidence, in the shape of affidavits, has already been given before Chaudhuri J., and the affidavits are on the file available for the use of the Court—it will be open to the Court to consider such evidence and to take further evidence if it thinks fit, due care of course being taken, if any examination of witnesses takes place, that the person against whom the charge is made is not put into a position of prejudice, or called upon in any way to incriminate himself.

MOOKERJEE J. I agree that the order made by Chaudhuri J. cannot be supported.

The Small Cause Court Judge dismissed the application for sanction to prosecute the appellant under section 195 of the Criminal Procedure Code on the ground that the alleged offence had not been committed in relation to any proceeding in any Court. The applicant for sanction then brought up the matter to this Court under section 195 (6) read with section 195 (7) (c). Chaudhuri J. has held, and in my opinion correctly held, that the ground assigned by the Small Cause Court Judge in support of his order is erroneous; he has accordingly discharged that order and remanded the case for enquiry and final disposal by the Small Cause Court Judge. It has been argued before us that the order of remand for fresh investigation is erroneous as not contemplated by section 195(6). That clause provides that any sanction given or refused under the section may be revoked or granted by any authority to which the authority giving or refusing it, is subordinate. Where, as in the case before us, the subordinate Court has refused sanction, the superior Court is, upon a plain reading of section 195 (6), authorised either to confirm that order or to grant sanction; but the superior Court is not authorised to remand the case for further enquiry and for final

disposal in accordance with the result thereof. This position cannot be and has not been contested; it is, indeed supported by several judicial decisions: *Anonymus* (1), *Beni Prasad v. Sarju Prasad Thakuria* (2), *In re Kamma Narayanappa* (3), *Muhammad Ishaq v. Muqimuddin* (4). But the Standing Counsel has contended that when a subordinate Civil Court has made an order under section 195, the High Court is competent to interfere, not merely under clause (6) of that section, but also in the exercise of its revisional powers under section 115 of the Civil Procedure Code and to pass, under the latter section, such order as it may deem proper. In support of this view reliance has been placed upon the decision of Pugh J. in *Ramadhin Bania v. Sewbalak Singh* (5) which is based upon the view taken by the Allahabad High Court in *In the matter of the petition of Bhup Kunwar* (6) and *Salig Ram v. Ramji Lal* (7). There has been considerable divergence of judicial opinion upon the question, whether, when a High Court revises an order of a subordinate Civil Court made under section 195 of the Code of Criminal Procedure the source of the authority for such interference should be sought in section 115 of the Civil Procedure Code or in section 439 of the Criminal Procedure Code. The cases of *Ram Prosad Roy v. Sooba Roy* (8), *Guru Churn Saha v. Girija Sundari Dasi* (9), *In re Chennanigoud* (10), *Muhammad Yakub v. Muhammad Tyab* (11), *Salig Ram v. Ramji Lal* (7), *Kannambath Imbichi Nair v. Manathanath Ramar*

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(1) (1906) 16 Mad. L. J. 45 S. N.

(2) (1911) I. L. R. 33 All. 512.

(3) (1910) 11 Cr. L. J. 699.

(4) (1912) 14 Cr. L. J. 178 ;
48 P. R. Cr. 29.

(5) (1910) I. L. R. 37 Calc. 714.

(6) (1903) I. L. R. 26 All. 249.

(7) (1906) I. L. R. 28 All. 554.

(8) (1897) 1 C. W. N. 400.

(9) (1902) 7 C. W. N. 112.

(10) (1902) I. L. R. 26 Mad. 139.

(11) (1903.) All. W. N. 172.

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Nair (1), *Kali Prosad Chatterjee v. Bhuban Mohini Dasi* (2), *Mahomed Bhakku v. Queen-Empress* (3), *Ranjit Singh v. Shibba Mal* (4), *In re Bal Gangadhar Tilak* (5), *Emperor v. Bankatram Lachiram* (6), directly or impliedly support the view that section 115 of the Code of Civil Procedure is applicable. On the other hand, the decisions in *Bishen Singh v. Amritsaria* (7), *Emperor v. Barkat Ram* (8), *Shankar Rao v. Shaik Daud* (9), *Musaji v. Muhammad* (10), *Venkata Rama v. Achayga* (11), favour the view that it is competent for the High Court to revise the order of the subordinate Civil Court in such circumstances, only under sections 435 and 439 of the Criminal Procedure Code. In my opinion, this controversy as to the rival claims of section 115 of the Civil Procedure Code and sections 435 and 439 of the Criminal Procedure Code is based upon a misapprehension, and the fallacy which underlies the decision of Pugh, J., in *Ramadhin Bania v. Sewbalak Singh* (12) is the erroneous assumption that one of these sections must be applicable. The true view is that section 195 creates a special jurisdiction, as explained in *Audimulam v. Krishnayan* (13), and provides in clause (6) the machinery for the correction of possible errors committed by the primary Court. Consequently, upon well-known principles, the interference by the High Court must be attributed, neither to section 115 of the Code of Civil Procedure nor to sections 435 and 439 of the Criminal Procedure Code, but only to section 195 (6)

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| (1) (1905) I. L. R. 29 Mad. 122. | (8) (1911) 12 Cr. L. J. 216. |
| (2) (1903) 8 C. W. N. 73. | (9) (1908) 8 Cr. L. J. 351. |
| (3) (1896) I. L. R. 23 Calc. 532. | (10) (1903) 6 Oudh Cases 216. |
| (4) (1905) All. W. N. 85. | (11) (1916) 7 Cr. L. R. 381 ; |
| (5) (1902) I. L. R. 26 Bom. 785. | 33 Ind. C. 824. |
| (6) (1904) I. L. R. 28 Bom. 533. | (12) (1910) I. L. R. 37 Calc. 714. |
| (7) (1908) P. R. Cr. 10 ; | (13) (1912) 22 Mad. L. J. 418 ; |
| 7 Cr. L. J. 281. | 13 Cr. L. J. 209. |

of the Code of Criminal Procedure. As Lopes, L. J., observed in *The Queen v. County Court Judge of Essex* (1), "in the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies, the procedure, forms and remedies there prescribed and no others must be followed." To the same effect is the exposition by Lord Halsbury in *Pasmore v. Oswaldtwistle Urban District Council* (2): "the principle that where a specific remedy is given by a statute, it thereby deprives the person, who insists upon a remedy, of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law." In the case before us, the machinery for correction of possible errors is provided in clause (6) of section 195, and, consequently, the party who seeks relief must have recourse thereto and cannot invoke the aid of section 115 of the Code of Civil Procedure or sections 435 and 439 of the Criminal Procedure Code. The remedy provided is not restricted in scope; the superior tribunal is not limited to an examination of questions of fact or questions of law alone, but may, upon a review of all the circumstances, either affirm or reverse the order of the primary Court: *Jamna Doss v. Sabapathy Chetty* (3), *Ram Raja Dat v. Sheo Dayal* (4). It is thus immaterial, whether the remedy provided in clause (6) is regarded as in the nature of an appeal or a revision, specially when we remember that, as explained by Westbury L. C., in *The Attorney-General v. Sillem* (5) and by this Court in *Secretary of State for India v. B. I. S. N. Co.* (6), what is technically called revision is only one aspect of the appellate jurisdiction. I am not unmindful that successive

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(1) (1887) L. R. 18 Q. B. D. 704.

(4) (1915) I. L. R. 37 All. 439.

(2) [1898] A. C. 387.

(5) (1864) 10 H. L. C. 704.

(3) (1911) I. L. R. 36 Mad. 138.

(6) (1911) 13 C. L. J. 90.

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applications of section 195 (6) may be necessary, when the primary Court is subordinate in the second degree to a High Court. That recourse may be had to the remedy provided by section 195 (6), in this manner, is shown by numerous decisions: *Girija Sankar Roy v. Binode Sheikh* (1), *Habibar Rahman v. Khoda Bux* (2), *Palaniappa Chetti v. Annamalai Chetti* (3), *Kannambath Imbichi Nair v. Manathanath Ramar Nair* (4), *Muthuswami Mudali v. Veeni Chetti* (5), *In re Narayana Nadar* (6); though there has been some divergence of judicial opinion on the subject: *Mata Prasad v. Baran Barhai* (7), *Kanhai Lal v. Chhadammi Lal* (8), *Muhammad Yasin v. Cheda Lal* (9). The position then is that the assistance of this Court could, in the present case, have been invoked, only under section 195 (6) of the Criminal Procedure Code. Under that provision, the only order which Chaudhuri, J., was competent to pass, subject to the observation I shall presently make, was to grant sanction, if he was of opinion that sanction had been refused on erroneous grounds. But I am further of opinion that Chaudhuri, J., had, in the view I take, no jurisdiction to deal with this matter. Under the Rules of Court (Chap. II, Rule V) he would have jurisdiction if this were a matter under section 115 of the Civil Procedure Code; but as it falls within section 195 (6), it could be decided only by a Judge or Judges to whom it might have been allocated by the Chief Justice [*cf. Kali Kinkar Sett v. Dinobandhu Nandy* (10), *Jamna Doss v. Sapatthy* (11)]. I thus see no escape from the conclusion

(1) (1906) 5 C. L. J. 222;
 5 Cr. L. J. 188.

(2) (1906) 5 C. L. J. 219;
 11 C. W. N. 195.

(3) (1903) I. L. R. 27 Mad. 223.

(4) (1905) I. L. R. 29 Mad. 122.

(5) (1907) I. L. R. 30 Mad. 382.

(6) (1914) 26 Mad. L. J. 486;
 15 Cr. L. J. 271.

(7) (1914) I. L. R. 36 All. 469.

(8) (1908) I. L. R. 31 All. 48.

(9) (1915) 13 All. L. J. 709.

(10) (1905) I. L. R. 32 Calc. 379.

(11) (1911) I. L. R. 36 Mad. 138.

that the order made by Chaudhuri, J., must be set aside, *first*, because it was made without jurisdiction; and, *secondly*, because it contravened the provisions of section 195 (6). The application must consequently be reheard by such Judge or Judges as may be appointed by the Chief Justice.

When the case comes to be reheard, the question must arise, whether the Court is competent to hold an inquiry into the facts, and for this purpose to act on evidence adduced before it or before the subordinate Court under its direction. The cases of *Rama Aiyar v. Venkatachella Padayachi* (1) and *Krishna Reddy v. Emperor* (2) support the view that the Court does not possess such power under section 195 (6). I am not prepared to accept this proposition as well founded in law; and in this conclusion I am supported by the decision of Piggott J. in *Rahamatullah v. Emperor* (3). The section does not specify the procedure to be followed by the superior tribunal, and I feel no doubt that the Court has inherent power to take such steps as may be necessary to enable it to discharge the duty imposed upon it. As I had occasion to observe, in the course of my judgment in the case of *Pulin Behary Das v. King-Emperor* (4), Criminal Courts, no less than Civil Courts, exist for the administration of justice, and Courts of both description have inherent power to mould the procedure, subject to the statutory provisions applicable to the matter in hand, to enable them to discharge their functions as Courts of justice. [See also *Ahmed Ali v. Keenoo Khan* (5)]. I am not unaware that the Criminal Procedure Code does not contain a provision corresponding to section 151 of the Civil Procedure

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(1) (1907) I. L. R. 30 Mad. 311.

(3) (1915) 17 Cr. L. J. 29.

(2) (1909) I. L. R. 33 Mad. 90.

(4) (1912) 15 C. L. J. 517.

(5) (1908) I. L. R. 36 Calc. 44.

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Code; but that section does not lay down any new principle; it merely embodies a legislative recognition of the inherent power of the Court to make such orders as may be necessary for the ends of justice. This inherent power is in no sense restricted in application to civil cases; it is equally applicable to criminal matters. The power is not capriciously or arbitrarily exercised; it is exercised *ex debito justitiæ* to do that real and substantial justice for the administration of which alone courts exist; but the Court, in the exercise of such inherent power, must be careful to see that its decision is based on sound general principles and is not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions. Let me examine the matter before us in the light of this principle. If the Small Cause Court had adopted the course commended by Turner L. J., in *Tarakant Bannerjee v. Puddomoney Dossee* (1) as desirable in all appealable cases, namely, to complete the investigation and pronounce an opinion on all the important points, this Court, in the event of disagreement with the subordinate Court on the question of law, would still have ample material before it to enable it to give judgment on the merits. Inasmuch as such materials have not been recorded by the primary Court, there is no conceivable reason why suitable measures should not be adopted in that behalf, in other words, why steps should not be taken by the superior tribunal to have the evidence recorded either before itself or before the subordinate Court under its direction. Such a step may be necessary, not merely in the interest of the prosecution, but also for the protection of the accused. I hold accordingly that when the case is re-heard, the Court will be at liberty

(1) (1866) 10 Moo. I. A. 476.

to give such directions as it may deem necessary, for ascertainment of all disputed questions of fact, to enable it to decide whether sanction should be granted or refused.

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*Case remanded.*Attorney for the appellant : *Sailendra Mohan Dutt.*Attorney for the respondent : *J. T. Hume.*

APPELLATE CIVIL.

Before Fletcher and Richardson JJ.

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Compromise—Minor—Court of Wards, compromise by, on behalf of minor ward, whether subject to sanction of Civil Court—Court of Wards Act (Beng. IX of 1879), ss. 18, 51—Civil Procedure Code (Act XIV of 1882), ss. 462, 464.

The sanction of the Civil Court (required by s. 462 of the Civil Procedure Code of 1882) is not necessary for a compromise entered into under the authority and by the direction of the Court of Wards on behalf of a minor under their charge.

APPEAL by Musammat Nakimo Dewani and others, the plaintiffs.

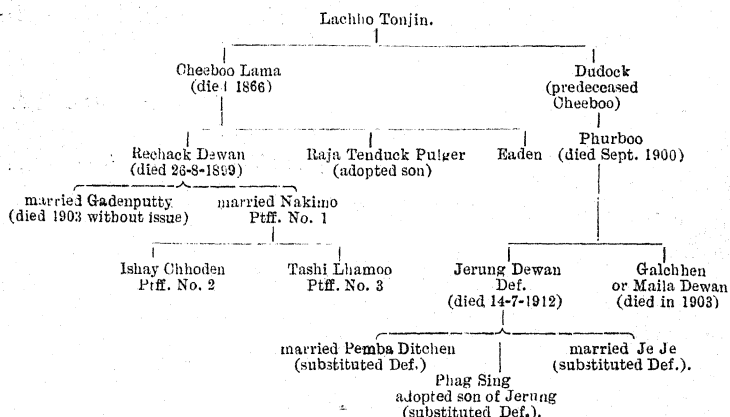
The following genealogical table shows the relationship of the parties who are Buddhist subjects of

* Appeal from Original Decree, No. 58 of 1914, against the decree of Bernard V. Nicholl, District Judge of Darjeeling and Dinajpur, dated Dec. 1, 1913.

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the Sikkim State settled in Darjeeling or British Sikkim :—



In 1862 the British Government made a grant of an extensive tract of country (74,016 acres) lying between the States of Nepal and Sikkim to one Cheeboo Lama, a Sikkimese nobleman, in return for political services during the Sikkim War. On Cheeboo's death the grant was split up among his successors, in August 1877 the Government making a lease of this property to Rechak, one Tenduck Pulger, who was then manager of the property, and Phurboo in three equal shares. The portion that fell to Rechak is known as the Reilling Estate. In 1881 the Forest Department acquired 44,000 acres of forest out of this property, and on 17th July 1889 there was a partition between Rechak and Phurboo, Rechak getting the properties in the district of Darjeeling and Phurboo getting all the properties in the State of Sikkim. Thereafter on 10th March 1893 the Government granted a lease of 19,000 acres out of the Reilling Estate to Rechak. On Rechak's death in 1899 Phurboo put forward his claim to succession as the nearest male agnate, but the District Judge on 31st March 1900 decided in favour of Rechak's widows on a reference

being made to him by the Deputy Commissioner in the mutation proceedings. For the purpose of carrying on litigation against Phurboo Dewan, Rechak's widows, Gadenputty and Nakimo, had contracted debts amounting to Rs. 65,000. Accordingly on 29th May 1905, Nakimo, the surviving widow, applied to the Court of Wards to take over charge of the estate representing herself to be the sole owner thereof. This petition followed a previous one made by her with the same object upon which the Board of Revenue had directed that the Court of Wards would take over charge of the estate under section 6 (c) of the Act provided that Jerung Dewan also made a similar application. This dispute was compromised by a deed dated 19th August 1905, executed by Nakimo on her own behalf and as trustee for her two daughters, Ishay Chhoden and Tashi Lhamoo, on one side and Jerung Dewan on the other. Jerung's title was admitted and he made certain provisions for Nakimo's and her daughters' maintenance. In consequence of this arrangement Nakimo on the 6th November 1905 petitioned the Court of Wards for the withdrawal of her application of 29th May 1905. But, before this petition had reached it, the Board of Revenue had passed an order on the 7th November placing the Reilling Estate under the Court of Wards, and effect was in due course given to this order. On 17th February 1906 the Board made an order making Nakimo's two minor daughters wards of the Court under section 35 of that Act. On 7th March 1906 the Board passed another order on a joint petition submitted by Nakimo and Jerung Dewan asking that the estate might be released and made over to the latter. The order was to the effect that the Court of Wards being of opinion, as then advised, that Nakimo's daughters were the rightful heirs of Rechak's estate could not, without disregarding its

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duty towards these minors, give up charge of the Reilling Estate unless Jerung's title as preferential heir was satisfactorily established. The result of this was that on the 5th February 1907 Jerung Dewan instituted a suit against Nakimo and her daughters, represented by the Court of Wards, for establishment of his title. Chubbi Lal, a Sub-Deputy Collector, who had been appointed manager by the Court of Wards, appeared as guardian for the wards as required by section 51 of that Act, he alone having been served with a summons, none being served on Nakimo or her daughters. Ultimately the suit was compromised on terms which, though less advantageous to Nakimo and her daughters, had previously received the express approval of the Court of Wards, and which were embodied in decrees made on 16th December 1907 and 12th March 1908. The present suit was instituted by Nakimo on 20th April 1910 impugning the validity of those decrees as the sanction of the Civil Court had not been obtained under section 462 of the Code of Civil Procedure. She made Jerung and her two daughters defendants. On the application of the latter they were joined as plaintiffs. Jerung died in 1912 and his two widows and adopted son Phag Sing were substituted as defendants. On 24th May 1913 the District Judge of Darjeeling rejected plaintiff's application for the appointment of a receiver. When the case came on for final hearing on the 3rd November 1913 time was granted till 8th November for effecting a compromise, the defendants being anxious to settle the dispute, especially as, on appeal in the mutation proceedings, the Deputy Commissioner had deferred passing orders until the adjudication of the question of title by the Civil Court, and further as the Sikkim *Durbar* had resumed the Chakung Estate in Sikkim for failure of male heir to Jerung. Though

almost two-thirds of the Reilling Estate was now offered to Nakimo, she refused to sign the petition of compromise and her vakil brought this to the notice of the Court. However, after trial the District Judge dismissed her suit on 14th November, 1913, holding that section 462 of the Code of Civil Procedure did not apply to the suit instituted by Jerung on 5th February 1907. Thereupon, Nakimo preferred this appeal to the High Court.

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Babu Provash Chandra Mitter and *Babu Tarakeswar Pal Chowdhuri*, for the appellants, (after stating the facts) submitted that Nakimo, who came into the hands of the Court of Wards with the whole estate, walked out with nothing except a little plot. The approval of the Civil Court not having been taken to that compromise under the provisions of section 462 of the Code of Civil Procedure then in force, it was voidable against the two minors. [Read sections 14, 18 and 51 of the Court of Wards Act, as to the powers of the Court of Wards.] Section 462 of the Code of Civil Procedure had placed an additional restriction on the Court of Wards. Though section 464 as originally enacted did not require the sanction of the Civil Court to a compromise entered into by the Court of Wards, the change in the wording of section 464, effected in the year 1888, had altered that provision; and section 462 did not derogate from the provision of any local law. If the compromise decree were set aside, Jerung's original suit must proceed, the *status quo ante* being restored.

[FLETCHER J. That is so.]

The *Standing Counsel* (*Mr. B. C. Mitter*, with him *Mr. S. N. Banerjee* and *Babu Sarat Kumar Mitra*), for the respondents, submitted that the view taken by the learned District Judge was correct. Section 51 of the Court of Wards Act took away from the Civil

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Court the duty of appointing a next-friend or guardian *ad litem* of a minor and appointed the Manager under the Court of Wards as the statutory next-friend or guardian. Then section 18 of the same Act gave power to the Court of Wards to compromise generally including both suits in and claims out of Court. To cut down the provisions of section 18 by applying to it the provisions of section 462 of the Code of Civil Procedure would derogate from the provisions contained in section 18. Further, the change in the wording of section 462 did not take away the plenary powers of the Court of Wards, which had never obtained the sanction of the Civil Court. Then as there was no specific allegation of fraud, that matter could not be gone into.

The *Senior Government Pleader* (*Babu Ram Charan Mitra*), for the Court of Wards. I support the principal respondent. As I have been unnecessarily made a party here, I ask for a separate set of costs.

Babu Provash Chandra Mitter, in reply. The amendment of the plaint and giving up of the question of title by plaintiffs' *vakil* does not bind them, so I am entitled to read the evidence as to plaintiffs' title and fraud by Chubbi Lal on the Court of Wards.

FLETCHER J. This is an appeal preferred by the plaintiffs against the decision of the learned District Judge of Darjeeling and Dinajpur, dated the 1st December 1913, dismissing their suit. The suit was brought for the purpose of setting aside a compromise that had been entered into in a former suit which is said to have been in contravention of section 462 of the Code of Civil Procedure which was then in force. The facts out of which the case arises are as follows:— One Lachho Tonjin had two sons, Cheebo and Dudock. The parties came from the State of Sikkim and the

law applicable to the parties is the Buddhist or the customary law as is recognised and which is in force in the State of Sikkim. Cheeboo, who seems to have rendered important political services to the British Government, was awarded for such services a grant of 74,016 acres of land in the district of Darjeeling. Cheeboo died in 1866, having been predeceased by his brother Dudock. Cheeboo left one son named Rechak Dewan and daughter named Eaden. Rechak died on the 26th August 1899, having been married twice, his first wife being Nakimo Dewani, who is the first plaintiff in the present suit, and the other wife being one Gadenputty, who died in 1903 without issue. Nakimo has had two children both of whom are daughters, namely, Ishay Chhoden and Tashi Lhamoo who are the other plaintiffs. Cheeboo's brother Dudock left an only son Phurboo. Phurboo had two sons, the eldest being Jerung Dewan. There seems to have been some controversy at the earlier stage of these proceedings and in the former suit as to whether Jerung was, in fact, a son of Phurboo; but the fact is that he claimed to be so and so far as the evidence goes, he was recognised as being the son of Phurboo. There was another younger son of Phurboo and that younger son was named Galchhen. He died in May 1903. The dispute arose as follows:—On the 10th August 1877, after Cheeboo's death, the Government made a lease of this property to Rechak, one Tenduck Pulger who was then the manager of the property and Phurboo in three equal shares. The Forest Department acquired 44,000 acres out of this property in 1881 and, on the 17th July 1889, there was a partition between Rechak and Phurboo, Phurboo getting all the properties in the State of Sikkim and Rechak getting the properties in the district of Darjeeling. On the 10th March 1893, the Government granted a lease of 19,000

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odd acres of land to Rechak. Then, after the death of Rechak, there having been certain disputes in the Civil Court which arose out of certain land registration proceedings, Nakimo applied to the Court of Wards to take charge of the estate. The Court of Wards at first intimated that Jerung Dewan must also be a party to the petition. However, in the result, on the 7th November 1905, the Court of Wards declared Nakimo to be a disqualified proprietor and took over charge of the property. On the 17th February 1906, the Court of Wards declared the two daughters of Nakimo, namely, Ishay Chhoden and Tashi Lhamoo to be minors and, on the 7th March of that year, the Court declared them also to be the heirs of Rechak Dewan. From the 17th February 1906, the two minors, Ishay Chhoden and Tashi Lhamoo, were disqualified proprietors and wards under the Court of Wards. Next, on the 5th February 1907, Jerung Dewan instituted a suit against Nakimo and the two minors, Ishay Chhoden and Tashi Lhamoo. In the course of that proceeding, a compromise was arrived at. That compromise was, as it appears from the petition of compromise and the letter of the Board of Revenue annexed to that petition, approved of by the Court of Wards.

The first point that has been argued both here and in the Court below and which apparently is the only point argued in the case is this: That the approval of the Civil Court not having been taken to that compromise under the provisions of section 462 of the Code of Civil Procedure, then in force, the compromise is voidable as against the two minors. That depends purely on an examination of the sections in the Civil Procedure Code and in the Court of Wards Act. The Court of Wards Act contains two sections that are material to the matter. The first is the 18th section. That

provides that "the Court may sanction the giving of leases or farms of the whole or part of any property under its charge, and may direct the mortgage or sale of any part of such property, and may direct the doing of all such other acts as it may judge to be most for the benefit of the property and the advantage of the ward."

The section by itself clearly authorises the Court of Wards to compromise a claim on behalf of the ward—whether a minor or an adult ward—if the Court judges it to be most for the benefit of the property or the advantage of the ward. The other section is the 51st section. That provides that, in all suits instituted by or against a minor ward, the Collector of the district or the manager shall be named, as the case may be, the next friend or the guardian of the minor for the suit. That is how the matter stands under the Court of Wards Act. It is said that the Code of Civil Procedure has placed an additional restriction on the Court of Wards by further enacting under the terms of section 462 that any compromise entered into by the Court of Wards on behalf of a minor litigant requires also the approval of the Civil Court. That turns purely on a consideration of the various sections that are in the Civil Procedure Code. It is, however, a matter to be noticed that section 464 of the Code as originally passed by the Legislature clearly did not require the sanction of the Civil Court to a compromise entered into by the Court of Wards. It is said, however, that the alteration in the wording of section 464, which was effected in the year 1888, altered that provision. Section 464 as it ran after the amendment of 1888 was in these terms:—"Nothing in this Chapter shall be construed to affect, or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors." The view that the learned Judge took in

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the Court below was that to give the effect that was suggested by the plaintiffs to the provisions of section 462 would, in fact, derogate from the provisions of the Court of Wards Act so far as regards suits relating to minors under their charge were concerned. The argument is as follows:—Section 51 of the Court of Wards Act takes away from the Civil Court the duty of appointing a next-friend or guardian *ad litem* of a minor and appoints the manager under the Court of Wards as the statutory next-friend or guardian. Clearly, therefore, the Civil Court has nothing to do with the appointment of a next-friend or guardian. Then section 18 of the same Act gives power to the Court of Wards to compromise generally which includes both suits in and claims out of Court, and to cut down the provisions of section 18 by stating that, when the ward is a minor, no compromise in a suit should be binding on the minor ward unless the approval of the Civil Court has been obtained as mentioned in the Civil Procedure Code would derogate from the provisions contained in section 18 of the Court of Wards Act. I am of opinion that that argument is well founded, and to hold that the sanction of the Civil Court to every compromise that is entered into under the authority and by the direction of the Court of Wards on behalf of a minor under their charge would seriously affect, or derogate from, the provisions contained in the Court of Wards Act. This point, as appears from the judgment of the Court below, was the only point argued before the learned Judge because the learned gentleman who conducted the case in that Court on behalf of the plaintiffs stated that he rested his case solely on the issue concerning the vulnerability of the decree of the 12th March 1908 and did not invite the Court to decide the issue of title by succession.

The case has also been attempted to be argued before us on the question of fraud, the fraud alleged being that the Court of Wards were deceived in giving their consent to the compromise by having been given false information relating to the course of succession under the Sikkim law. It is almost sufficient to deal with that case by stating that no evidence was given in the case as to what the fraud practised on the Court of Wards was. The Court of Wards had before them, as appears from the record, a full statement from the Deputy Commissioner as to what was proposed to be done and, before acting on the information and authorising the compromise, they took the precaution of sending all the papers that they had before them to the Legal Remembrancer asking him as to what ought to be done with regard to the matter, and it was only when the Legal Remembrancer had dealt with the matter fully that the Court authorised the compromise. An allegation like this seems to be wholly insufficient to disturb the act of the Court regularly and properly entered into. Moreover, the evidence that we have in this case raises a serious doubt as to whether the plaintiffs under the Bhutan law had the right of succession to Rechak's properties. There is a considerable body of evidence, notwithstanding some statements more or less loose of His Highness the Maharaja of Sikkim, as to the course of descent which would go to show that the course of succession was not through females, but was confined to agnatic relationship. In that view, it is not denied that Jerung Dewan would be wholly entitled to succeed to Rechak's properties after his death. The statement of the Maharaja of Sikkim that has been read to us seems to vary and nothing definite can be drawn from that. I think that the evidence does show that there was clearly a case in which the Court

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could enter into the compromise so as to secure the best terms possible for the two minors and there is nothing to suggest that better terms could have been obtained. The alleged fraud is wholly unproved and the gentleman conducting the case in the Court below stated that he did not intend to ask the Court for a decision upon the issue of title by succession. If the Court of Wards acted to the best of their judgment to secure for the two minors, out of the property to which they had no right at all, 2,000 acres of land and a property of some value in Darjeeling *plus* the payment of their father's debts which amounted to Rs. 64,000, I think the compromise was highly advantageous to the wards that the Court had under their charge. There is no evidence to support the case of fraud as set up in the 23rd paragraph of the plaint, namely, that a fraud of some sort was practised on the Court of Wards to get them to approve of that compromise. No evidence was given in support of such a case nor do I think that there is any truth in the story. The Court recognised that these minors had, in fact, under the terms of the law by which they were governed no right to their father's property, and they entered into the compromise to secure the best terms they could so that something might be got for these female wards. Whatever might be the state of affairs, I am quite clear that the evidence adduced is wholly insufficient to establish a case of fraud practised on the Court of Wards in the manner suggested. I think the result arrived at by the learned District Judge is correct. The present appeal, therefore, fails and must be dismissed with costs. There will be two sets of costs to the two sets of respondents.

RICHARDSON J. I agree.

G. S.

Appeal dismissed.

PRIVY COUNCIL.

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(AND 19 OTHER APPEALS CONSOLIDATED).

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[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Chaukidari Chakaran lands—Zamindar's title to such lands when transferred to him by Collector under s. 50 of the Village Chaukidari Act (Beng. Act VI of 1870) after their resumption by Government—Bengal Permanent Settlement, 1793—Bengal Regulations I of 1793 s. 8, cl. (4); and VIII of 1793, ss. 36 to 41—Putnidar's right to such lands under putni grant—Preservation of rights of third parties (by s. 51 of Beng. Act VI of 1870).

The suits which gave rise to this appeal were brought to recover khas possession from the appellant, the registered proprietor of extensive zamindaris in the Birbhum district of Bengal, of chaukidari chakaran lands resumed by Government and transferred to him under the provisions of the Village Chaukidari Act (Beng. Act VI of 1870). The plaintiff in each suit (respondents) was the putnidar or dar-putnidar of the village within the boundaries of which the land in each suit was situated. It was objected that the appellant had no such interest in the chaukidari chakaran lands as could be conveyed in a putni lease.

Held (on a consideration of the nature of chaukidari chakaran lands, the provisions of the Bengal Permanent Settlement of 1793, the Regulation of that time so far as they deal with chakaran lands, and the true meaning and effect of Bengal Act VI of 1870), that the zamindar obtained or retained in the chaukidari chakaran lands situate within the territorial boundaries of a village comprised in his zamindari an interest capable of being made the subject of a putni lease.

The settlement of 1793 recognises and proceeds on the footing that the zamindars are the actual proprietors of the land for which they undertake to pay the Government revenue; and it is clear that since the settlement

^c *Present*: LORD PARKER OF WADDINGTON, LORD SUMNER, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

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they have had a *prima facie* title to all lands for which they pay revenue such lands being commonly referred to as *malguzari* lands : see *Perhlad Sein v. Doorga Persaud Tewaree* (1).

On the Regulations of the Permanent Settlement the leading authority is *Joykissen Mookerjee v. Collector of East Burdwan* (2) in which Lord Kingsdown said that the effect of the settlement was to divide *chakaran* lands into two classes, viz., *thanadari chakaran* lands, that is, land held on service tenure by police officials, and all other *chakaran* lands. The former class were, by Bengal Regulation I of 1793, section 8, clause 4, made resumable by Government, the Government relieving the zamindars from the duty of maintaining a police establishment. These lands were in fact shortly afterwards resumed, and became Government lands, the title of the zamindars being extinguished by such resumption. As to all other *chakaran* lands, whether held by public officers or private servants in lieu of wages, they are dealt with by Regulation VIII of 1793, section 41. From sections 37 to 41 inclusive it appears that, whatever may be the case with regard to the private lands of the zamindars, or with regard to *chakaran* lands the services for which were purely personal to the zamindar it was clear that *thanadari* and *chankidari chakaran* lands, the services for which involved the performance of duties in which the public was interested, had not as a rule been taken into account for the purpose of increasing the revenue.

The effect of a resumption by the Government of *chankidari chakaran* lands under the provisions of Bengal Act VI of 1870 is that after the assessment is complete the Collector is under section 50, by order in the scheduled form to transfer to the zamindar subject to such assessment ; and by section 51 such order operates to transfer the land to the zamindar "subject to all contracts thereby made in respect of, under, and by virtue of which any person, other than the zamindar, may have any right to any land ; portion of his estate or tenure in the place in which such land may be situate". Those words are wide enough to include, and in their Lordships' opinion do include, the rights of a *putnidar* under a *putni* grant by virtue of which the *putnidar* is lessee of the zamindars' interest in the lands resumed, and also the rights of a *dar-putnidar* under a *dar-putni* grant. Not only therefore does the Act recognise the existing title of the zamindar to the lands resumed but the estate taken by the zamindar under the order of transfer is in confirmation and by way of continuance of his existing estate, and when the zamindar or those through whom he claims has or have entered into contracts affecting his existing estate the rights of third parties under those contracts are preserved.

CONSOLIDATED APPEAL 98 of 1914 from two judgments and twenty decrees (25th November 1909, and 3rd June 1910) of the High Court at Calcutta partly confirming and partly varying decrees (18th May 1907, and 20th May 1907) of the District Judge of Birbhum, and decrees (3rd July 1907, 29th August 1907, and 9th September 1907) of the Subordinate Judge of Rampurhat, which confirmed decrees (19th July 1906, and 10th January 1906) of the Subordinate Judge of Birbhum, and decrees (30th March 1906, and 13th and 18th March 1907) of the Court of the Munsif of Rampurhat.

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The defendant No. 1 was the appellant to His Majesty in Council.

The appellant is the proprietor of large zamindaris in the Birbhum district of Bengal, which were settled with his predecessors at the Permanent Settlement of 1793. Some of these zamindaris or mauzas within them have been from time to time settled by the predecessors of the appellant or by the appellant himself in putni; and in some cases the putnidars have assigned their rights to others by dar-putni grants. Within the area of these putni grants there have existed from the time of the Permanent Settlement certain chaukidari chakaran tenures, held by chaukidars, in lieu of wages or other remuneration, for the performance of certain duties. They were the village watchmen, and had certain public duties to perform in aid of the police and under the supervision of the District Magistrate. They also had to perform various services for the zamindar, in assisting in the collection of the rents of the zamindari, and looking after the boundaries of the villages comprised in it. These chaukidari chakaran lands and tenures were included in the zamindaris and estates settled at the time of the Permanent Settlement. Since the putni grants created by the appellant and his predecessors, the chaukidars holding chaukidari

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chakaran lands within the area of the sitnpuhave performed their zamindari duties under and for the benefit of the putnidar, and not for the Raja zamindar: and where the putnidar has created a dar-putni tenure the chaukidars have similarly performed the zamindari duties under and for the benefit of the dar-putnidar and not for the Raja zamindar or the putnidar.

By the Village Chaukidari Act (Bengal Act VI of 1870) the system of appointment and remuneration of chaukidars was altered, and it was provided, *inter alia*, that they should be under the control of panchayats to be appointed under the Act and paid out of a fund to be raised by assessment on the villagers. By sections 48 to 51 of the Act, it was provided that all chaukidari chakaran lands situated in any village in which the provisions of the Act have been put in force should be transferred by the Collector to the zamindar subject to the payment to the village chaukidari fund of an assessment at a rate to be approved by the Collector.

Section 51 provided that the order of the Collector should operate to transfer the land to the zamindar subject to such assessment, and subject "to all contracts theretofore made in respect of, under or by virtue of which any person other than the zamindar may have any right to any land portion of his estate or tenure in the place in which such land is situate."

A large number of these chaukidari chakaran tenures fell within the area of zamindaris and mauzas held under putni and dar-putni grants. These tenures the Collector of Birbhum resumed under the Act and transferred them to the Raja appellant as the zamindar. Thereupon, the putnidars and dar-putnidars called upon the appellant to transfer the lands to them in the way of settlement, claiming that they were within their putni grants; that they had always had

the services of the chaukidars of which they had been deprived, and that the appellant was not entitled as of right to deprive them of the lands. The appellant, however, not only refused these demands, but settled the lands with other persons.

The putnidars and dar-putnidars who claimed the chaukidari chakaran lands as forming portions of their grants brought the present suits in which the appellant was the first and principal defendant. The lessees with whom he had settled the resumed lands were also joined as defendants, but they never appeared, nor have they raised any objections to the plaintiffs getting khas possession of the lands.

In these suits no question has arisen between dar-putnidar plaintiffs and putnidar defendants. The only questions arising in these appeals for decision are between the appellant Raja as zamindar, and the plaintiffs respondents, the dar-putnidars and putnidars within the areas of whose grants the chaukidari chakaran lands in suit are situated.

Five of the suits were instituted between February and August 1905: two in the Court of the Subordinate Judge of Birbhum, and three in the Court of the Munsif of Rampurhat. They were for recovery of possession and for the transfer to the plaintiffs of chaukidari chakaran lands in mauza Koytha, and others in mahal Koer Pratap in Pargana Dhawa. The plaintiffs claimed them as being included within their putni grants, and stated that they had been in possession of them as part of their grants through the chaukidars who had performed for them the requisite zamindari duties; that they had been dispossessed of the lands by reason of the transfer to the appellant, in consequence of which the chaukidars had ceased to perform their duties for them, and that the appellant had refused to transfer and give them possession of

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the lands when called on to do so. They prayed for a declaration of their rights for khas possession and for an order directing the appellant to make a settlement with the plaintiffs and a transfer to them of the lands.

The defence of the appellant was a denial that the lands were included in the putni grants, and that the chaukidars had rendered services to the plaintiffs, putnidars, and dar-putnidars as alleged; he stated that the Government had resumed the lands in suit and in the years 1898, 1899 and 1900 had transferred them to him, and he had settled them with others, as he contended he had a right to do. He denied that the plaintiffs had any right in or to the lands in question, and contended that their suits were barred by limitation and should be dismissed.

The Subordinate Judge decided two of the suits, and three were decided by the Munsif of Rampurhat, and decrees for possession were made in favour of the plaintiffs in all of the five cases.

The suits, it was held, were for possession, and no question of limitation affected them, as on the appellant's own case the transfers to him were made well within the periods of limitation for the suits; that if the suits were treated as claims for specific performance, which the appellant contended they were, time under Article 113 of the Limitation Act would run from the date when the plaintiffs had notice that performance was refused which, it was proved, was in dates well within three years of the suits, and they were consequently not barred. It was further held that the chaukidari chakaran lands in suit were included within the putni grants, and that the right to them passed to the putnidars; that the evidence of the plaintiffs fully established their case as to the services which the chaukidars during the currency of

the putnis had rendered to the putnidars and darputnidars, of which they had been deprived in consequence of the transfer to the Raja appellant; that the transfers were, under section 50 of Bengal Act VI of 1870 subject to these contracts previously made by the zamindar; that the plaintiffs were entitled to decrees for khas possession; and that the conditions on which the lands in suit should be held under the zamindar must be the subject of another suit.

The District Judge of Birbhum, on appeal by the Raja, upheld the judgments and decrees of the Trial Judges.

The Raja appealed to the High Court under section 100 of the Civil Procedure Code, 1908; and that Court (HOLMWOOD AND CHATTERJEE JJ.) who (except that they remanded the cases to the lower Courts to decide as to the conditions on which the transfers should be made by the Raja to the plaintiffs which the High Court held ought to be decided in these suits) practically affirmed the judgments and decrees appealed from and dismissed the appeals.

The judgment of the High Court, dated 25th November 1909, will be found reported in I. L. R. 37 Calc. 57.

The other 15 suits now under appeal were brought in February, April and June 1906 in the Court of the Munsif of Rampurhat. The questions raised and decided in them were the same as in the suits brought in 1905. The Munsif made decrees in favour of the plaintiffs in all the suits; which were affirmed by the Subordinate Judge of Birbhum, and on 3rd June 1910 by the High Court (BRETT AND SHARFUDDIN JJ.) to which the Raja again appealed under section 100 of the Code of Civil Procedure, 1908.

The High Court having refused an application for leave to appeal to His Majesty in Council, the Raja

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was granted special leave by an order dated 5th July 1911.

On this appeal,

De Gruyther, K.C., and *E. U. Eddis*, for the appellant, contended that the chaukidari chakaran lands did not at any time prior to the transfer under Bengal Act VI of 1870, belong to the appellant or his predecessors in title, and therefore not having any interest in those lands they could not have included them in the terms of any putni lease: see the form of transfer in Schedule C of Bengal Act of 1870. The putnidars consequently had no right to possession of the lands in question. Even if the zamindar had an interest in the lands, the change effected by Act VI of 1870 conferred on him a fresh title which would not be affected by any putni lease granted by him or his predecessors in title. The settlement of 1793 only recognised the zamindar as proprietor of lands assessed with revenue. Regulation VIII of 1793, section 41, applied only to revenue-paying lands, and not to chaukidari chakaran lands which were police lands and were governed by Regulation I of 1793, section 8, clause (4). The case of *Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra* (1) is in favour of the appellant as to its interpretation of the definition of chaukidari chakaran lands in section 1 of Bengal Act VI of 1870; and that view is consistent with *Joykishen Mookerjee v. Collector of East Burdwan* (2). Admitting that the decisions cited in the High Court judgment are adverse, as *Kazi Newaz Khoda v. Ram Jadu Dey* (3), yet *Kashim Sheik v. Prasanna Kumar Mukerjee* (4), which held that the zamindar got a new title by the transfer,

(1) (1914) I. L. R. 42 Calc. 710; (2) (1864) 10 Moo. I. A. 16, 18, 20.

L. R. 42 I. A. 30.

(3) (1907) I. L. R. 34 Calc. 109.

(4) (1906) I. L. R. 33 Calc. 596.

supports the appellants' contention. Section 51 of Act VI of 1870 does not apply to putnis.

Sir H. Erle Richards, A. M. Dunne and H. N. Sen, for the respondent Khuki, and *Sir William Garth*, for the respondent Rani Mina Kumari Saheba, contended that on the concurrent findings of the lower Courts the questions of fact as to the respondents' right to the lands in suit, and the plea of limitation, were not open to further appeal. The obstacles in the appellants' way are (i) that section 41 of Regulation VIII of 1793 was inconsistent with the view that the ownership of the chaukidari chakaran lands was in the Government before the transfer; (ii) that the matter in dispute was concluded by the authority of *Joykishen Mookerjee v. Collector of East Burdwan* (1); and (iii) that there is a current of decisions in Calcutta adverse to the contention of the appellant, except for the case of *Kashim Sheik v. Prasanna Kumar Mukerjee* (2) which was to a certain extent in their favour. This substantial uniformity should not be disturbed. The appellant's contention that the lands did not belong to him as zamindar was not raised in the Courts below and should not be raised now. If, as was contended, the lands were Government lands, there was no reason in saying they would be "security for Government revenue." Chaukidari chakaran lands were not included in the exceptions in section 36 of Regulation VIII of 1793. The case of *Joykishen Mookerjee v. Collector of East Burdwan* (1) has been expressly adopted in *Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra* (3). The chain of authorities in the High Court strongly supports the respondents. Reference was made to *Kazi Newaz Khoda v.*

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(1) (1864) 10 Moo. I. A. 16.

(2) (1906) I. L. R. 33 Calc. 596.

(3) (1914) I. L. R. 42 Calc. 710;

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Ram Jadu Dey (1), *Harak Chand v. Charan Chandra Singha* (2), and *Rakhal Das Mukerjee v. Madhab Chandra Singha* (3). The putnidars and dar-putnidars are entitled under section 51, Bengal Act VI of 1870. Putni leases are contracts within the meaning of that section—"Transfer" meant a release from all claims for service on the part of the Government. This appeal is covered by the decisions of the Board, and by the statute law. Reference was also made to the definitions of "chaukidari chakaran lands" and of "zamindar" in Bengal Act VI of 1870.

Eddis, in reply. The points now taken by the appellant were taken before the High Court. The chaukidari chakaran lands here were not assessed; and in the case of *Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra* (4), the whole of the zamindar's lands were assessed, and therefore though called "chaukidari chakaran" lands, they did not come within the definition of the "chaukidari chakaran" lands in Bengal Act VI of 1870. That case is in appellants' favour, as it shows that if the Government had proved that the lands in question were not assessed they would have succeeded, and they would have been right in resuming and transferring the lands.

The judgment of their Lordships was delivered by

Jan. 24.

LORD PARKER. This is a consolidated appeal from decrees of the High Court of Judicature at Fort William, in Bengal, made in twenty suits, each of which, though relating to a distinct subject-matter, raised substantially the same questions of law. Each suit was in substance a suit to recover possession from

(1) (1907) I. L. R. 34 Cal. 109.

(4) (1914) I. L. R. 42 Cal. 710 ;

(2) (1910) 15 C. W. N. 5.

L. R. 42 I. A. 30.

(3) (1910) 15 C. W. N. 61.

the appellant, who is the registered proprietor of extensive zemindaris in the Birbhum district of Bengal, of chaukidari chakaran lands recently resumed by Government and transferred to him under the provisions of Act VI of 1870 of the Bengal Council. The plaintiff in each suit was the putnidar or dar-putnidar of the village within the boundaries of which the lands the subject of the suit were situate. In those suits in which the dar-putnidar was the plaintiff, the putnidar was made a defendant, but took no part in the argument. The decree in each suit was in favour of the plaintiff and against the appellant.

Their Lordships consider it unnecessary to deal at further length with the history of the litigation. It is abundantly clear from the facts found in the Courts below, and was not disputed before their Lordships' Board, that any interest which the appellant or his predecessors in title, originally had in the lands the subject of each suit had, prior to the resumption and transfer of such lands under the Act of 1870, been transferred to and become vested in the plaintiff putnidar or dar-putnidar by virtue of the lease or sub-lease under which he held the villages in which these lands were situate. Two points only were argued before their Lordships. It was contended, *first*, that the proprietor with whom a zemindari was settled under the Bengal Permanent Settlement, did not obtain or retain in the chaukidari chakaran lands situate within the territorial boundaries of a village comprised in his zemindari any interest capable of being made the subject of a putni lease; and, *secondly*, that even if he obtained or retained any such interest, the effect of the Act of 1870 was to confer on him a new title not in any way affected by any putni lease theretofore granted by him or his predecessors in title. In order to arrive at a conclusion on these questions,

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it is necessary to consider (i) the nature of chaukidari chakaran lands, (ii) the provisions of the Bengal Permanent Settlement, and (iii) the true meaning and effect of the Act.

At the time of the English occupation a zemindar was responsible not only for the payment of the revenue, but for the preservation of peace and order within his district. For the latter purpose he maintained tannahdars, or police officials, and chaukidars, or village watchmen. Both had from time immemorial been remunerated by allotments of lands to be held in consideration of the services they rendered to the zemindar, either rent-free or at a low rent, but whereas the police official rendered police service only, the chaukidar not only assisted the police, but rendered acts of service personal to the zemindar. Chakaran lands are lands held by service tenure. Generically the term includes all lands so held, whether by police officials, chaukidars, or persons whose only duties are personal to the zemindar. The expression "tannahdari lands or tannahdari chakaran lands" means lands held on service tenure by tannahdars or police officials. The expression "chaukidari chakaran lands" means lands held on service-tenure by chaukidars, or village watchmen. As one would naturally expect, it had long been customary, in fixing the revenue or jumma payable for the zemindari, to leave tannahdari and chaukidari chakaran lands out of account.

Passing to the settlement of 1793, it appears to their Lordships to be beyond controversy that whatever doubts be entertained as to whether before the English occupation the zemindars had any proprietary interest in the lands comprised within their respective districts, the settlement itself recognises and proceeds on the footing that they are the actual proprietors of

the land for which they undertake to pay the Government revenue. The settlement is expressly made with the "zemindars, independent talukdars and other actual proprietors of the soil" (see Regulation I, section 3, and Regulation VIII, section 4). It is clear that since the settlement the zemindars have had at least a *prima facie* title to all lands for which they pay revenue, such lands being commonly referred to as malguzari lands (see the case of *Rajah Sahib Perhlad Sein v. Doorga Persaud Tewaree* (1).

Bearing this in mind, their Lordships will proceed to consider the Regulations of the Permanent Settlement, so far as they deal with chakaran lands. The leading authority on this subject is *Joykishen v. Collector of East Burdwan* (2). To use Lord Kingsdown's expression in that case, the effect of the settlement is to divide chakaran lands into two classes, namely, (i) tannahdari chakaran lands, that is, lands held on service tenure by police officials, and (ii) all other chakaran lands. As to chakaran lands of the former class, they were by Bengal Regulation I, section 8, clause 4, made resumable by Government, the Government relieving the zemindar from the duty of maintaining a police establishment. These tannahdari chakaran lands were, in fact, shortly afterwards resumed and became Government lands, the title of the zemindar being extinguished by such resumption. As to all other chakaran lands, whether held by public officers or private servants in lieu of wages, they are dealt with by Bengal Regulation VIII, section 41.

In order to understand the 41st section of the last mentioned Regulation, it is necessary to refer to some of the preceding sections. By virtue of the 36th section the assessment is to be fixed exclusive and

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(1) (1869) 12 Moo. I. A. 286, 331. (2) (1864) 10-Moo. I. A. 16.

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independent of all existing lakhiraj lands, that is lands exempted from the public revenue. Such lands are therefore in effect withdrawn from the settlement, and the zemindar, though these lands might be locally situate within his district, could claim no title therein by virtue of the settlement.

Sections 37 to 40 deal with certain lands referred to as "private lands" of the zemindars. By section 37 these are not to be included in the lakhiraj lands referred to in section 36, and special directions with regard to them are given in sections 38, 39, and 40. Speaking generally, such lands are not excluded from, but on the contrary are included in, the settlement. Then comes the 41st section dealing with chakaran lands; these, whether held by public officers or private servants in lieu of wages are also not to be included in the lakhiraj lands referred to in section 36. They are to be annexed to the malguzari lands and declared responsible for the public revenue assessed on the zemindaris in which they are included in common with all other malguzari lands therein.

Sections 37 to 41 inclusive appear to their Lordships to suggest that neither the "private lands" of the zemindars nor chakaran lands had theretofore been taken into account in fixing the revenue for which the zemindar was responsible to Government. Otherwise there would be no point in excluding them from the lakhiraj lands dealt with by section 36. However this may be with regard to the private lands of the zemindar or with regard to chakaran lands, the services for which were purely personal to the zemindar, it is quite clear that tannahdari and chaukidari chakaran lands, the services for which involved the performance of duties in which the public was interested, had not, as a rule, been taken into account for the purpose of increasing the jumma.

The effect of section 41 appears to be this: The question whether any of the chakaran lands therein referred to ought to be taken into account for the purpose of increasing the jumma, is left to be determined by the custom which had hitherto prevailed or any special directions contained in the Regulations. But whether or not so taken into account, all chakaran lands are to be considered malguzari for the purpose of ascertaining the lands in respect of which the jumma is paid and upon which it is secured. The *primâ facie* title of the zemindar to chakaran lands within his district is thus recognised by the settlement. Tannahdari chakaran lands may be resumed under Regulation I, section 8, clause 4, but with regard to all other chakaran lands, if resumable at all, they can be resumed by the zemindar alone. In the case, however, of chaukidari chakaran lands, not even the zemindar may be entitled to resume them, for chaukidars have public duties to perform and the lands which they hold on service tenure as remuneration for the performance of such duties, are to that extent appropriated or assigned for public purposes. Subject, nevertheless, to the requirements of the public interest, the zemindar is the owner and as such is entitled to the enjoyment of any personal services which the chaukidars ought to render and when vacancies occur to appoint others in their place. All this follows from what was said by Lord Kingsdown in *Joykishen v. Collector of East Burdwan* (1).

Such, then, being the zemindar's interest in chaukidari chakaran lands within his district, it is difficult to see why this interest should not be made the subject of a putni grant. That it could be so made appears to have been admitted in the last-mentioned case, and the whole of Lord Kingsdown's judgment.

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proceeds on that footing. In their Lordships' opinion, there can be no reasonable doubt on this matter. Indeed, the only argument to the contrary advanced by the appellant's counsel was based on certain expressions used by Mr. Ameer Ali in giving the reasons of the Board in the recent case of *The Secretary of State for India v. Kirtibas Bhupati Harichandan Mahapatra* (1). In that case, which has little, if any, bearing on the questions now in controversy, the point for decision was whether the power of resumption conferred by Act VI of 1870 extended to certain chakaran lands which the Government had affected to resume thereunder. Here it is admitted by everyone that the powers of the Act were applicable. Moreover, it is abundantly clear that Mr. Ameer Ali, whatever expressions he used, did not intend to depart in the smallest degree from what had been laid down by Lord Kingsdown in *Joykishen v. Collector of East Burdwan* (2). Under these circumstances, any argument based on a meticulous examination of isolated expressions used by him can, in their Lordships' opinion, have little weight.

It remains to consider the effect of a resumption by the Government of chaukidari chakaran lands under the provisions of Act VI of 1870 of the Bengal Council.

It should be observed that the definition of chaukidari chakaran lands contained in the Act refers not only to the public duties of chaukidars, but also to their personal duties to the zemindar. It is apparently for this reason that the revenue assessment on the lands resumed is, by section 49, fixed at only one-half of the annual value of such lands. If the zemindar had no interest, the effect of this provision would be

(1) (1914) L. L. R. 42 Calc. 710 ; (2) (1864) 10 Moo. I. A. 16.

L. R. 42 I. A. 30.

to make him a free gift of half of the value of the lands resumed. It appears to be for the same reason that the zemindar is, under section 50, entitled to contest the correctness of any assessment which is made. After the assessment is complete the Collector is, under section 50 by order in the scheduled form, to transfer the land to the zemindar subject to the assessment. By the 51st section such order operates to transfer the land to the zemindar subject to such assessment and "subject to all contracts theretofore made in respect of, under or by virtue of which any person other than the zemindar may have any right to any land, portion of his estate, or tenure in the place in which such land may be situate." The latter words may not be very happily chosen, but their obvious intention is to preserve the rights of third parties. They contemplate a case in which the village in which the resumed lands are situate has been made the subject of a contract by the zemindar, of those through whom he claims and that under this contract some third party may have an interest in the lands resumed. They are wide enough to include, and in their Lordships' opinion do include, the rights of a putnidar under a putni grant by virtue of which the putnidar is lessee of the zemindar's interest in the lands resumed, and also the rights of a dar-putnidar under a dar-putni grant. In their Lordships' opinion, therefore, not only does the Act recognise the existing title of the zemindar to the lands resumed, but the estate taken by the zemindar under the order of transfer is in confirmation and by way of continuance of his existing estate, and when the zemindar or those through whom he claims has or have entered into contracts affecting his existing estate the rights of third parties under these contracts are preserved. It is a satisfaction to their Lordships to find that the view above expressed

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is that hitherto almost universally adopted in the Indian Courts.

The result is that the appeal fails and should be dismissed, and their Lordships will humbly advise His Majesty accordingly. With regard to costs, the appellant should pay to the respondents who have appeared one set of costs between them, but these should, having regard to the terms on which leave to appeal was granted, be as between solicitor and client.

J. V. W.

Appeal dismissed.

Solicitors for the appellant : *Downer & Johnson.*

Solicitors for Kiranbala Dasi : *Watkins & Hunter.*

Solicitor for *Mina Kumari Saheb* : *G. C. Far.*

PRIVY COUNCIL.

P.C.²

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Feb. 1.

BASANTA KUMAR ROY

v.

SECRETARY OF STATE FOR INDIA.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 142, 144—Suit to recover land diluviated and re-formed in situ—Dispossession—Adverse possession—Continuation of possession of land while diluviated—Definition section 3 of Limitation Act—Continuous possession of successive owners when it cannot be combined.

The appellants sued to recover khas possession of a 10-anna share with mesne profits in portions of certain manzas which after being diluviated had reformed *in situ*. The question was whether the land in suit belonged to the plaintiffs' mahal, or to the principal respondents' (defendants') mahal. The suit was brought on 6th September, 1904. The Subordinate Judge found in favour of the plaintiffs' title and that the suit was not

² *Present* : LORD PARKER OF WADDINGTON, LORD SUMNER, SIR JOHN EDGE AND SIR LAWRENCE JENKINS.

barred by limitation. It was common ground that the period of limitation applicable was twelve years, the main contest being as to whether article 142 of Schedule II of the Limitation Act, 1877, was applicable, or article 144. The High Court decided the case on limitation alone holding that the suit was barred by article 142.

Held by the Judicial Committee (upholding the decision of the first Court both on title and limitation), that there had not been down to September 1892 any dispossession of the plaintiffs within the meaning of article 142. An owner of land does not discontinue his possession of it whilst it is diluviated. Constructively it continues until he is dispossessed, and upon the cessation of the dispossession before the statutory period of limitation has elapsed, constructively it survives.

Leigh v. Jack (1), per COTTON L. J., followed.

It seemed to follow that there can be no continuance of adverse possession when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation.

Secretary of State for India v. Krishnamoni Gupta (2) approved.

In the present case beyond temporary utbandi cultivation there was nothing down to 1892 to show an exclusion of the plaintiffs by the Revenue authorities. Whether the land cultivated was the same each year or not does not appear : at any rate it was annually submerged, and there were no circumstances to link together various portions of ground so as to make the possession of a part, as it emerged, amount constructively to the possession of the whole.

Mohini Mohan Roy v. Promada Nath Roy (3) referred to.

No dispossession having occurred (except possibly within 12 years of the commencement of the suit) article 144 and not article 142 was the article applicable. Whether or not in the circumstances of the case conduct which was insufficient to evidence dispossession can be used to evidence adverse possession available to the defendants, they failed on the ground that the period of time necessary to bring them under the protection of article 144 could not be made out unless to the period during which they were in possession there was added, out of the prior period when it is contended the Revenue authorities had possession, a number of years going back to 1892, and that could not be done in this case for the reason shown in the definition section 3, that the defendants did not derive their liability to be sued "from or through" the Revenue authorities in any sense of the words. They had in fact advanced a claim adverse to those authorities and had succeeded in it.

(1) (1879) L. R. 5 Exch. D. 264, 274. (2) (1902) I. L. R. 29 Calc. 518 ;
L. R. 29 I. A. 104.

(3) (1896) I. L. R. 24 Calc. 256, 259.

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APPEAL 30 of 1912 from a decree (12th July 1909) of the High Court at Calcutta, which reversed a decree (30th June 1906) of the Subordinate Judge of Nuddia.

The plaintiffs were the appellants to his Majesty in Council.

The main questions for decision on this appeal were whether the suit is barred by limitation; and whether the appellants have made out their title to the lands in suit.

The facts were that the appellants were the owners of a half share of the 10-anna revenue estate Lot Mahomed Aminpur, bearing towji No. 3989 in the Hooghly Collectorate. while the respondents 2 to 8 were the owners of the entire 6-anna estate Lot Gobindpur bearing towji No. 100. The appellants alleged that mauzas Durlabhpur, Jirat, and Hatikanda appertained to their estate Lot Mahomed Aminpur as to a 10-anna share and as to the remaining 6-anna share to the estate of Lot Gobindpur. The respondents say that the three villages above-named appertained exclusively to their estate Lot Gobindpur. On this appeal the allegation of the appellants was taken as being correct, as was found to be the case by the Subordinate Judge. It was also admitted in his Court that "the lands in suit are reformations on their old sites of diluviated lands of mauzas Durlabhpur, Jirat and Hatikanda."

The moiety of the estate of Lot Aminpur was formerly held by the appellants' father, and passed to them on his death in 1883. The appellants being then infants, their father's estate was placed under the management of the Court of Wards where it remained till January 1894, the official Manager during that time paying to the Government the revenue due from the appellants in respect of the mahal No. 3989. In 1889 he purchased on the appellants' account, the

interest of a patnidar, Beni Madhab in mauza Hatikanda. After January 1894, the estate was managed and the revenue paid by the appellants who were in 1899 registered in respect of their interest in Mahomed Aminpur as owners of the entire estate 3989.

It was not disputed that in 1870 the mauzas in suit were bounded by the bank of the Bhagirathi river, which subsequently shifted its course and submerged them and other lands. In 1888, part of the land reformed and appeared as a chur or island in the stream during part of that year. Shortly afterwards, the officials allowed utbundis to cultivate small portions of the chur. The rest of the land reformed gradually, and in 1894-95 about 2,060 bighas appeared above water, and the utbandi cultivation extended to 681 acres; but for five months in the year the whole was completely submerged. In 1894 it was found that part of the chur was a reformation of a mauza called Sardanga the owner of which mauza entered thereon, and in 1903 it was ascertained that the rest of the chur which had increased much in area, was a reformation of mauzas Durlabhpur and Jirat. The Collector then had before him claims to possession of those mauzas by the present appellants and respondents, and he preferred the latter who gave proof that they were entitled at any rate to a share. The respondents, thereupon, entered on the land, and subsequently on further portions of mauzas Durlabhpur and Jirat, and also on part of mauza Hatikanda which in course of time reformed. Further portions of the mauzas reformed during the pendency of the litigation.

On 6th September 1904, the present appellants instituted the suit which gave rise to this appeal against Government and the owners of mahal No. 100, and the raiyats in occupation, and as formal defendants the other persons interested in Mahomed Aminpur. They

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set out the facts and prayed for a declaration of their title and for possession and mesne profits.

The chief defence was made by the owners of mahal No. 100, who denied the appellants' title, and set up the plea of limitation on the ground of adverse possession.

The Subordinate Judge found in favour of the appellants. He held that there was ample evidence to show that a 10-anna share of mauzas Durlabhpur, Jirat, and Hatikanda appertained to the appellants' estate, Lot Mahomed Aminpur, and that their claim was not barred by adverse possession, and he made a decree accordingly.

The present respondents (among others) appealed to the High Court and a Bench of that Court (CHITTY and CARNDUFF JJ.) set aside the decree of the Subordinate Judge, and decided the case on the point of limitation, holding it to be "clearly established that the plaintiffs have never held possession, actual or constructive, of any portion of the lands in dispute since the reformation in 1888: that at least from 1889 the Government was in possession adversely to the plaintiffs until 1902 when they released the whole to the appellants" (the present respondents), "and that from 1902 the adverse possession was continued by them."

The suit was accordingly held to be barred by limitation.

On this appeal,

Sir R. Finlay, K. C., and *Kenworthy Brown*, for the appellants, contended that their title was established by the evidence in the case; and it was not barred by limitation. Article 144 of Schedule II of the Limitation Act, 1877, was, it was submitted, applicable and not article 142. The onus was on the respondents to show 12 years' adverse possession: *Radha*

Gobind Roy v. Inglis (1), and *Secretary of State for India v. Chellikani Rama Rao* (2). There was no possession by the Government adverse to the appellants: *Karan Singh v. Bakar Ali Khan* (3)—which showed that payment by the Collector in possession did not constitute adverse possession by the person to whom it was paid. There could have been no adverse possession of Government until 1894 when the appellants were infants and their lands in charge of the Court of Wards. Possession by Government could not be adverse to the appellants when they were wards of Government: *Thomas v. Thomas* (4); and the suit was brought in 1904. Possession of the guardian is possession of the ward: Smith's L. C. (11th Ed.) Vol. II, pages 651, 652. While the lands were diluviated the constructive possession was in the appellants: *Secretary of State for India v. Krishnamoni Gupta* (5). There was no possibility here for any person or persons to have had continuous possession. In any event the respondents were not entitled to claim the benefit of the period of possession by Government because their liability to be sued did not arise "from or through" (as under section 3 of the Limitation Act, 1877) but adverse to the Government. The respondents too could not claim adverse possession against their co-sharers: *Trustees and Executors Agency Co. v. Short* (6). The possession of a tenant-in-common is the possession of all the tenants-in-common. The case of *Runjit Singh v. Schoene Kilburn & Co.* (7), cited by the High Court, was not an exposition of the present law of limitation, as it followed *Nitrasur Singh*

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(1) (1880) 7 C. L. R. 364.

(4) (1855) 2 K. & J. 79.

(2) (1916) I. L. R. 39 Mad. 617;

(5) (1902) I. L. R. 29 Calc. 518;

L. R. 43 I. A. 192.

L. R. 29 I. A. 104.

(3) (1882) I. L. R. 5 All. 1;

(6) (1888) 13 A. C. 793.

L. R. 9 I. A. 99.

(7) (1879) 4 C. L. R. 390, 398.

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v. *Nund Lal Singh* (1) and was decided under the old Regulation on limitation which was altered by the Limitation Act of 1871. Reference was also made to *Muhammad Aminulla Khan v. Badan Singh* (2), *Mohima Chandra Mozoomdar v. Mohesh Chandra Neogi* (3) decided on article 142 of the Limitation Act, 1877, and not applicable here; *Innasimuttu Udayan v. Upakarath Udayan* (4), *Rajkumar Roy v. Gobind Chunder Roy* (5) and *Jogendra Nath Roy v. Baldeo Das* (6).

De Gruyther, K.C., and *O'German*, for the respondents 2 to 8, contended that the appellants had not established title to the lands in dispute, and that even if they had at some time a title, the present suit was barred. In any case article 142 of Schedule II of the Limitation Act, 1877, was the article applicable: *Mohima Chandra Mozoomdar v. Mohesh Chandra Neogi* (3) and *Muhammad Aminulla Khan v. Badan Singh* (2). The appellants' possession discontinued when the land was reformed, and they did not take possession. There was too a dispossession by the cultivation by utbandi tenants. Further, the Government took possession under Bengal Regulation XI of 1825 and were holding against the world, and not as trustees, and under section 28 of the Limitation Act, 1877, the appellants' title was extinguished, and could not be revived. Government gave a good title to the respondents by release to them in 1902. The possession of the Government was, it was submitted, adverse to the appellants notwithstanding they were wards under the Court of Wards Act, 1879: *Sheoraj Singh v.*

(1) (1860) 8 Moo. I. A. 199, 220.

(2) (1888) I. L. R. 17 Calc. 137 ;

L. R. 16 I. A. 148.

(3) (1888) I. L. R. 16 Calc. 473 ;

L. R. 16 I. A. 23.

(4) (1899) I. L. R. 23 Mad. 10 ;

L. R. 26 I. A. 210.

(5) (1892) I. L. R. 19 Calc. 660 ;

L. R. 19 I. A. 140

(6) (1907) I. L. R. 35 Calc. 961, 972.

Collector of Muradabad (1). There was no question of the parties being co-sharers in the ordinary sense because the estates were separate, and the owners paid separate revenue. Even if article 144 of the Limitation Act was applicable, Government had held possession adversely for 12 years and their possession was that of the respondents.

The appellant was not called on to reply.

The judgment of their Lordships was delivered by

LORD SUMNER. This suit was brought by members of a family called the Kumars of Dighapatia against certain persons, called collectively the Kundu Babus of Mahiari, to recover khas possession, jointly with their co-sharer maliks, of a 10-anna share in portions of mauzas Durlabhpur, Jirat, and Hatikanda. Wasilat was also claimed. Some years ago the Ganges overflowed these lands. They have now reformed *in situ*.

The plaintiffs held one moiety of the zamindari lot Mahomed Aminpur, the other moiety being held by various persons, who were joined as subordinate defendants. To this mahal, bearing towji No. 3989 of the Hooghly Collectorate, this 10-anna share was said to have belonged for at least a century. The 6-anna share was the property of the principal defendants in right of their zamindari, viz., lot Gobindpur bearing towji No. 100. The Trial Judge found for the plaintiffs' title. The High Court criticised this decision as having been arrived at "without any real discussion or consideration of the documentary evidence," but did not expressly dissent from it. They allowed the appeal on another ground. Having examined the documentary evidence in question with some care, their Lordships conclude that the decision of the Trial Judge in this regard was right.

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The plaintiffs put in an extract from the Quinquennial Register of pergunnah Mahomed Aminpur, for A. D. 1816, which showed that a 10-anna share in each of the three mauzas then belonged to Taluq Mahomed Aminpur. An extract from the Mahalwari Register, apparently for A. D. 1880, showed these mauzas still belonging to Mahomed Aminpur, though not under the same towji number and stated the maliks, as recorded in the General Register, to be certain persons of whom one was Purna Chandra Roy, the plaintiffs' predecessor in title. It further remarked that part or all of the land of these mauzas was ijmalî, without naming either the co-sharers or the proportions of the shares. No doubt these entries are in some respects inconclusive. For several years, from 1888 onwards until 1894, when the guardianship of the Court ended, the plaintiffs were minors, whose property was in the charge of the Court of Wards, and they produced documents showing that year after year each of these mauzas was administered on their behalf, and that rents and profits collected in respect of them were credited to the account of the plaintiffs. Amdanis of money on account of rent, towji accounts, extracts from the jumma-wasil-baki accounts and karcha accounts were forthcoming in regular sequence, in which the plaintiffs were stated to be proprietors and their share to be a 10-anna share in towji No. 3989. To these proofs of enjoyment no real answer was made, and their Lordships see no reason to question the finding of the Trial Judge in favour of the plaintiffs' title.

The identity of the lands in suit held by the principal defendants with those originally washed away, to which the plaintiffs made title, was accepted by the Trial Judge, doubted but not decided by the High Court, and strenuously contested before their

Lordships. Before the trial an ameen was appointed to survey the *locus in quo* and set it out on a map. The limits of the ground in dispute were agreed and shown on this map. Portions of each of the three mauzas fell beyond them. At the instance of the principal defendants the ameen also prepared a map purporting to show the natural features "as contained in the release map of 1886." In his report he stated that the latter features depended on the position of a palm-tree, which was taken as the datum because it was said to be the only thing that had survived from 1886, and to be identical with a palm-tree shown on a copy map produced by the defendants and alleged to be a map of things as they were in that year. No proof of the identity of this palm-tree was forthcoming; no thak map was produced; no release of 1886 or any evidence of it was put in. It is plain that the ameen thought that this map of the supposed features of 1886 was not worth much, and their Lordships think so too.

The respondents' argument rested on three points: first, that since 1886 they had been, as they said, in possession of certain portions of a chur known as Chur Raninuggur No. 1, that by superimposing the ameen's 1886 map on his survey of 1906, it would be seen that part of the area disputed in this action, though claimed as part of Chur Raninuggur No. 2, really fell within Chur Raninuggur No. 1, and that there had been a confusion of mauza Jirat, which lay in the north of the disputed area, with an area called Chur Jirat, which lay outside of it and to the south, some miles away. Their Lordships' Board has had occasion before now [*Raj Kumar Roy v. Gobind Chandra Roy* (1)] to deprecate the practice of "propounding

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riddles of this kind," and to point out how rarely they succeed. It may be doubted if such efforts are worth the labour they involve. After the best consideration that they could give, their Lordships are clear on one point only, namely, that this case was not made at all at the trial, and is not made out now. The Trial Judge records that, "it is admitted on both sides that the lands in suit are reformations on their old sites of diluviated lands of mauzas Durlabhpur, Jirat, and Hatikanda." On that admission he proceeded, and by that admission, in their Lordships' opinion, the respondents must be bound. In the result the plaintiffs have made out their case alike as to title and parcels.

There remains the question on which alone the High Court proceeded, the question of limitation. This involves some account of the history of the reformed land. At the date of the Government survey of 1869 and 1870 the three mauzas lay to the west of the Bhaghirathi. Shortly after that date the river began to traverse bodily to the south-west, in a direction at right angles to the axis of its course at that part of the stream, and steadily moved for some miles across country till in 1906 only portions of Jirat and Hatikanda, and no part of Durlabhpur were any longer to the west of the river. The total area submerged no doubt extended far beyond the bounds of these mauzas. As the river passed on, churs began to form. Chur Raninuggur No. 1 was the first; Chur Raninuggur No. 2, somewhere within which the present reformations fall, began to appear as an island chur in 1888. The plaint in the present suit was filed on the 6th September 1904. It is common ground that the period of limitation applicable is twelve years, the contest being whether article 142 of Schedule II of Act XV of 1877 is the article applicable or

article 144. The critical time is the time prior to the 6th September 1892.

A great body of evidence was called, of which the Trial Judge says that witnesses "have sworn hard without any regard to truth." Neither side has ever thought it worth while to quote what they said to their Lordships. If the appellants are right, the question is whether the respondents had adverse possession before September, 1892; if the respondents are right, the question is whether before that time the appellants had not been dispossessed. A good deal had been said about the burden of proof in either case, but as their Lordships find the evidence sufficient to establish a clear conclusion of fact, it cannot matter now by which party it was given. Their Lordships accordingly pass by the question who would have suffered if the facts had turned out otherwise or had not been proved at all, and proceed to examine them.

The best evidence of the history of the chur lands in question is to be found in the Collectorate reports of the Settlements of 1894, 1899 and 1902. An island chur in or about this spot was thrown up in 1888, but was unfit for assessment, and apparently for cultivation, till 1890. At first the surrounding water was unfordable on all sides, but further accretions soon attached it on the north to Chur Raninuggur No. 1. In 1889 it was first treated as an accretion to Chur Raninuggur No. 1 and Jirat, which had been released to Suksagar zamindars, as reformatations *in situ* of their mauzas, and then shortly afterwards came to be considered as an accretion to the part of Chur Raninuggur No. 1, which was a Government estate. It was not regularly surveyed till 1894, but, beginning in the year 1891-1892, it was under direct management on the utbandi system on yearly settlements. The area then producing a rent was about 350 bighas; in

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the following year it was slightly more. On the survey in 1894, the area of this chur was found to be 2,060 bighas, of which 583 were by this time under cultivation. The residue was uncultivated jungle, and the whole of it was every year completely under water from the beginning of June to the end of October. Naturally, the land was then very poor, and there was no resident raiyat in the mahal.

The chur had so far increased by 1894 that a raiyat-wari settlement was then made with the utbandi raiyats for a term of five years. On the expiration of this term it was again surveyed, and its area was found to have increased to over 3,000 bighas, and 86½ acres of it were released to the proprietor of estate No. 399, as being land which was a reformation *in situ* of his mauza Sardanga. It would seem that a further portion of it had been previously released to the owner of mauza Baliadunga. The cultivable lands were then settled again for an undefined term.

In 1902 the principal defendants petitioned the Collector of Nuddia for the release to them of the lands in question, alleging that they were reformations *in situ* of lands belonging to their estate, lot Gobindpur, towji No. 100, and ten months later the officiating Collector granted the petition. In his judgment the petitioners had proved their title and the identity of the reformed lands, and the Government could not legitimately resist their claim. Accordingly possession was delivered in due form, by planting a bamboo on the estate, by proclamation, and by beat of drum.

The report of 1899 in terms speaks of these reformed lands as being the "property" of the Government resumed in 1888, which at most means that in time the Government's actual possession, such as it was, might be expected to ripen into ownership. The report of 1902 speaks of possession, direct management,

and settlement. The order of 1903, while avoiding the term "property," because it recognised the property of the petitioners, recited that the Government took possession of Chur Raninuggur No. 2 in 1888, the year in which it came into existence as a chur. These documents, however, were reciting what had happened some years before, and presumably after some change of Collectors in the meantime, and it is very noticeable that in the khasras of the chur the column headed "Name of proprietor and landlord," appears to have been left blank until 1899, when it is filled in for the first time with the name of the Empress of India.

The Limitation Act of 1877 does not define the term "dispossession," but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession: constructively it continues, until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land is not capable of use and enjoyment" [per Cotton, L.J. in *Leigh v. Jack* (1)]. It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. When sufficient time has elapsed to extinguish the old title and start a new one, the new owner's possession of course continues until there is fresh dispossession, and revives as it ceases.

In the case of *Secretary of State for India v. Krishnamoni Gupta* (2), their Lordships' Board

(1) (1879) L. R. 5 Exch. D. 264, 274. (2) (1902) I. L. R. 29 Cal. 518;

L. R. 29 I. A. 104.

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applied this view to a case, where a river shifting its course first in one direction and then in the opposite direction, first exposed certain submerged lands, of which the Government took possession, and then after a few years flooded them again. No rational distinction can be drawn between that case and the present one, where the reflooding was seasonal and occurred for several months in each year. It was held that when the land was re-submerged the possession of the Government determined, and that, while it remained submerged, no possession could be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner.

Again, to apply the test suggested by Bramwell, L. J. in *Leigh v. Jack* (1), at p. 273, "to defeat a title by dispossessing the former owner, acts must be done, which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it," and therefore it is necessary to look at the position in which the former owner stands towards the land, as well as to the acts done by the alleged dispossessor. "It is impossible," says Lord Halsbury in *Marshall v. Taylor* (2) "to speak with exact precision about the degree of possession or dispossession that will do, unless you have regard, as Lord Justice Cotton said in *Leigh v. Jack* (1) to the nature of the property." An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely, acts which *prima facie* are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character or have some other object. In the present case beyond the temporary

(1) (1879) L. R. 5 Exch. D. 264, 273. (2) [1895] 1 Ch. 615.

utbandi cultivation itself there is nothing down to 1892 to show an exclusion of the plaintiffs by the Revenue authorities.

Their Lordships are of opinion that, whatever may have been the case later on, there had not been, down to September 1892, any dispossession of the plaintiffs within the meaning of article 142. The evidence of possession by the Government consists in the direct management under which bandobastdars cultivated at annual rents. Two Collectors' orders, dated in 1889, are referred to, but not exhibited, under which the land was first of all "treated" as an accretion to one property and almost immediately afterwards "considered" as an accretion to another; but, beyond the utbandi cultivation, nothing was done. Whether the land cultivated was the same each year or not does not appear; at any rate, it was annually submerged, and there are no circumstances to link together various portions of ground, so as to make the possession of a part, as it emerged, amount constructively to possession of the whole [*Mohini Mohan Roy v. Promoda Nath Roy* (1)]. The lands in question in this suit form only a part of Chur Raninuggur No. 2. It cannot be shown that they formed part of the land cultivated, or of the chur which had emerged up to 1892. It is quite possible that most, if not all, of the land cultivated between 1891 and 1893 may have belonged to the land, which was shortly afterwards released to the Baliadunga and Sardanga zamindars. It is clear that in those early years there was considerable uncertainty as to the course the reformation was taking, and the fact must have been well known that the chur might turn out to be a reformation *in situ* of the land, which had only diluviated within the previous twenty years.

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If, as their Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, article 144 is the article applicable, and not article 142. It is not easy to see in the circumstances of a case such as this how conduct insufficient to evidence dispossession of the plaintiffs can be used to evidence adverse possession available to the defendants; but, be that as it may, in their Lordships' opinion the defendants' contention resting on article 144 fails on another ground. The period of time requisite to bring the defendants under the protection of article 144 cannot be made out, unless to the period during which the defendants have been in possession there is tacked, out of the prior period when it is contended that the Revenue authorities had possession, a number of years going back to 1892. The definition section 3 shows that in the present case this cannot be done. The defendants do not derive their liability to be sued "from or through" the Revenue authorities in any sense of the words. They advanced a claim of their own adversely to the Revenue authorities, which was rested on prior title and possession, and sought to put an end to conduct on the part of those authorities which, they asserted, was inconsistent with and an invasion of their own superior title. On investigation the Revenue authorities recognised and submitted to this adverse claim and withdrew from any enjoyment or occupation. If the defendants could make good now the claim which they made then, well and good; but they would succeed, not by reason of, but independently of, the Limitation Act. Upon this ground they fail as far as article 144 is concerned.

In this view of the case, it is not necessary to decide two points much discussed before their Lordships: *first*, that the defendants' possession could not,

as such, be deemed to be adverse to their co-sharers or available to deprive the plaintiffs of their rights; and, *second*, that the possession of the Revenue authorities could not be availed of against the plaintiffs by reason of their being at the time minors under the guardianship of the Court of Wards. In differing from the High Court upon the determination of the appeal, their Lordships do not wish to be taken as expressing any opinion adverse to their view on this second point.

In the result their Lordships will humbly advise His Majesty that the appeal should be allowed with costs, the judgment of the High Court should be set aside with costs, and the decision of the Trial Judge should be restored. As the first defendant on the record, the Secretary of State for India in Council, lodged no case and did not appear before their Lordships to support or resist the appeal, their Lordships do not advise that the terms of any order as to costs should affect him.

J. V. W.

Appeal allowed.

Solicitors for the appellants: *Watkins & Hunter.*

Solicitors for the respondents 2 to 8: *T. L. Wilson & Co.*

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March 8.**[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, CENTRAL PROVINCES.]**

Privy Council, Practice of—Appeal in criminal case—Conviction on charge of murder—Sentence of death, confirmation of by Court of Appeal—Improper admission of evidence by Court of Appeal in treating entries in police diary as being evidence—Criminal Procedure Code (Act V of 1898) ss. 172, 374—Error said to vitiate confirmation of sentence.

According to the practice of the Judicial Committee in dealing with an appeal in a criminal case, the general principle is established that the Sovereign in Council does not act in the exercise of the prerogative right to review the course of justice in criminal cases in the free fashion of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below.

Under section 172 of the Criminal Procedure Code (Act V of 1898), every police officer making an investigation is to enter his proceedings in a diary which may be used at the trial or inquiry, not as evidence in the case but to aid the Court in such inquiry or trial. And by section 374 when the Court of Session passes sentence of death the proceedings are to be submitted to the High Court for confirmation, and the sentence is not to be executed unless it is confirmed by that Court. In this case which was one of murder the accused was convicted by the Sessions Judge and sentenced to death and that sentence was substantially in every material particular

* *Present*: VISCOUNT HALDANE, LORD ATKINSON, LORD SHAW, LORD PARMOOR, AND MR. AMEER ALI.

confirmed by the Court of the Judicial Commissioner (as the High Court) on appeal. After confirming the sentence, the Court of Appeal took into consideration the police diary, made during the preparation of the case, for the purpose of testing the credibility of some of the witnesses for the defence, and treated the entries therein as being evidence in the case discrediting them.

Held by the Judicial Committee, that the Court was clearly wrong in so treating the entries in the police diary in a manner which was inconsistent with the provisions of section 172 of the Criminal Procedure Code.

Que n-Empress v. Mannu (1) approved.

But such improper admission of evidence was not a sufficient reason why their Lordships should recommend interference with the judgment and sentence. The conditions of the Code as to jurisdiction had been complied with; the Court of Appeal had before it evidence on which it placed reliance and on which it could properly have based its affirmance and confirmation of the conviction. An error in procedure may be of so grave a character as to warrant the interference of the Sovereign, as for instance, if it deprived an accused of a constitutional or statutory right to be tried by a jury or by some particular tribunal; or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed. Even if their Lordships thought the accused guilty they would not hesitate to recommend the exercise of the prerogative, were such the case. But here the error consisted only in the fact that evidence had been improperly admitted which was not essential to a result which might have been come to wholly independently of it. Substantial justice had been done, and that being so, it would be contrary to the general practice to advise the Sovereign to interfere with the result.

APPEAL 114 of 1916 from a judgment (19th April 1916) of the Court of the Judicial Commissioner, Central Provinces, dismissing an appeal from a judgment (24th February 1916) of the Court of Sessions, Jubbulpore Division, whereby the appellant was convicted of murder under section 302 of the Penal Code, and sentenced to death, and confirming that sentence.

The appellant was one of five persons who, by an order of the 1st Class Magistrate, Jubbulpore, dated

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19th November 1915, were committed to the Court of Sessions, Jubbulpore Division, two of them the appellant and one Bhojraj, on charges under section 148, (rioting with deadly weapons) and section 302 (murder) and the other three under section 147 (rioting) of the Penal Code. All of them were tried together by the Sessions Judge with the aid of two Assessors who gave it as their opinion that none of the accused were guilty. The Sessions Judge acquitted all the accused except the appellant whom he found guilty of murder and sentenced him to death. The Sessions Judge had, as appeared from his judgment, used the police diary as evidence in the case.

The appellant, appealed, from that conviction and sentence to the Court of the Judicial Commissioner, and the case also came before that Court for confirmation of the sentence under section 374 of the Code of Criminal Procedure. The Court of Appeal (J. K. BATTEN and H. J. STANYON, Additional Judicial Commissioners) dismissed the appeal and confirmed the sentence; but in arriving at their conclusions the Court of Appeal took into consideration some of the entries in the police diary for the purpose of testing the credibility of the witnesses, and so treated the statements as evidence contrary to the provisions of section 172 of the Criminal Procedure Code (Act V of 1898).

The appellant, thereupon, applied for and obtained special leave to appeal to His Majesty in Council.

For the purpose of this report the facts are sufficiently stated in the judgment of their Lordships of the Judicial Committee.

On this appeal,

De Gruyther, K. C., and *J. M. Parikh*, for the appellant, contended that the Court of Appeal had, contrary

to the provisions of section 172 of the Civil Procedure Code (Act V of 1898), made use of the police diaries as evidence in the case, and had given a decision thereon in favour of the credibility of the witnesses for the prosecution; and that as a Court of Criminal Appeal had no power to make such use of the police diaries, and of the statements therein of the appellant made to the police officer investigating the case, the judgment of the Court of Appeal was vitiated by such wrong procedure. Reference was made to sections 162 and 172 of the Code of Criminal Procedure, and *Queen-Empress v. Mannu* (1). The effect of the wrong use made of the police diaries and the consequent admission of inadmissible evidence in contravention of the express provisions of the Code and the Evidence Act, had deprived the appellant of the statutory right to appeal, and to have the sentence properly confirmed, given by him by the Criminal Procedure Code, and constituted a grave and substantial injustice bringing the case within the rule as to Criminal Appeals to the Privy Council laid down in *In re Dillet* (2); see *Arnold v. King-Emperor* (3). The appellant was entitled to have his conviction properly considered by a Court of Criminal Appeal which could be done either by setting aside the judgment of the Court below, or by the Board dealing with it as a Court of Criminal Appeal, so that the statutory rights of the appellant may be protected. Reference was made to sections 154, 156, 161, 376 and 439 of the Criminal Procedure Code. The information given to the police by the appellant was not admissible in evidence section 25 of the Evidence Act (I of 1872), being under a confession to a police officer, and tending to prove the guilt of the appellant: see Archbold's

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(1) (1897) I. L. R. 19 All. 390.

(3) (1914) I. L. R. 41 Calc. 1023 ;

(2) (1887) L. R. 12 A. C. 459.

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Criminal Pleadings, Evidence, and Practice (Ed. 1910), page 391.

Sir H. Erle Richards, R. C., and Sir William Garth, for the respondent.

[VISCOUNT HALDANE said the Board wished to have counsel on three points: (a) whether in the Court of Appeal the course adopted in the use of the police diaries was justified? (b) What is the effect on the proceedings in the appeal and, on the confirmation of the sentence, of the diaries being so used? and (c) what is the position of the Board having regard to the case of *In re Dillet* (1)?]

With respect to (a) both the Sessions Court and the Court of Appeal were empowered by section 172 of the Code of Criminal Procedure to make use of the police diaries to aid the Court. As to (b) the statements made to the police were not used as evidence; and that even if they were so used, there was sufficient evidence in the case apart from them on which the Court of Appeal could and would have come to the same conclusion, and the Board would therefore be justified in upholding the confirmation of the sentence as being complete and untouched by the error in procedure. Reference was made to the Evidence Act 1872, section 167. No injustice whatever had been done. With regard to (c) a substantial defect must be shown owing to which defect there had been a grave miscarriage of justice. It was submitted that here there had been nothing which brought the case within the rule in *In re Dillet* (1), *Arnold v. King-Emperor* (2) and *Ibrahim v. King* (3). Reference was also made to section 4(k) of the Criminal Procedure Code.

(1) (1887) L. R. 12 A. C. 459.

(2) (1914) I. L. R. 41 Calc. 1023 ;
L. R. 41 I. A. 149.

(3) [1914] A. C. 599.

De. Gruyther. K.C., in reply, referred to *Ibrahim v. King* (1), *Makin v. Attorney-General of New South Wales* (2) and *Subrahmania Ayyar v. King-Emperor* (3).

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The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case the appellant was convicted of murder by the Sessions Court of Jubbulpore, and was sentenced to death. The Court of the Judicial Commissioner of the Central Provinces heard an appeal and dismissed it, and confirmed the sentence under the provisions of the Indian Code of Criminal Procedure.

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A petition for leave to appeal was presented to the King in Council. It was argued before this Board in support of the petition that the judgments in the Courts in India had been vitiated by an illegal and prejudicial use of the police diaries in the case, and that the credibility of the witnesses had been thereby wrongly estimated. What had taken place, it was alleged, had led to such a miscarriage of justice as to bring the conviction within the exceptional class of cases in which His Majesty in Council will review the proceedings in a criminal trial in India.

It is well settled that the unwritten principles of the Constitution of the Empire restrain the Judicial Committee from being used in general as a Court of Review in criminal cases. But while the Sovereign in Council does not interfere merely on the question whether the Court below has come to a proper conclusion as to guilt or innocence, such interference ought to take place where there has been a disregard of the proper forms of legal process, grievous and not merely technical in character, or a violation of principle in

(1) [1914] A. C. 599.

(3) (1901) I. L. R. 25 Mad. 61;

(2) [1894] A. C. 57.

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such a fashion as amounts to a denial of justice. Their Lordships have now heard full arguments in the case before them, and have examined the procedure and evidence with some minuteness.

Before considering the result, it is right that they should state what they conceive to be, in a case such as that before them, the character of the limitation of their function. The Constitution of the Empire is tending to develop in the direction of regarding as final decisions given in the local administration of criminal justice. The general principle is established that the Sovereign in Council does not act, in the exercise of the prerogative right to review the course of justice in criminal cases, in the free fashion of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below.

In the light of these observations, their Lordships turn to the circumstances in the present case. There is no doubt that, on the 23rd October, 1915, a woman named Kalia, who lived at Hardua, a village near Jubbulpore, was murdered by blows from some such weapon as an axe. The blows were of a deadly character, and one of them almost decapitated her. The prosecution alleged that the blows were delivered by the accused, Dal Singh. The defence was that they came from one Mohan, the husband of Kalia, who was said

to have killed his wife in order to lay the foundation of a false charge against Dal Singh.

The case made for the prosecution was shortly as follows: That, on the morning of the murder, Dal Singh sent for Mohan, who was one of his tenants, and forced him to work at his (Dal Singh's) granary without payment; that, at the time of the midday meal Mohan went back to his own field, and when sent for by Dal Singh refused to return; that thereafter, about 4 P.M., the accused came to Mohan's field on horseback, accompanied by four servants, with the object of forcing Mohan to return to work; that an altercation then ensued, in the course of which the accused, who had an axe in his hand, attacked Mohan; that the latter climbed up his *marwa* (a platform raised on a framework of poles with bars across them to escape from him, and while standing on one of the cross-bars was cut on the legs by the accused with the axe; that Mohan shouted out, and his wife, Kalia, then sought to restrain the accused by clasping him round the waist, and was thereupon killed with axes by the accused and one Bhojraj, a servant of his: that as the accused was remounting his horse to go away, one Jhunni, a brother of Mohan, came up, having been attracted by the latter's cries, and hit the accused on the head with a stick, knocking off his cap and causing him to drop his axe; that the accused then rode away, accompanied by his servants.

The defence was that Dal Singh was not present when the murder was committed, and that Kalia was really killed by her husband, Mohan, for the purpose of getting up a false charge against Dal Singh. Kalia was said to have been blind, and it was contended that it was hardly possible that she could have been able to find and lay hold of Dal Singh in the manner suggested.

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The charges laid by the police, and ultimately tried, were that Dal Singh and Bhojraj had rioted with deadly weapons, and had committed murder, and that Shankar, Dal Singh's servant, and Nanhe and Mithua, who were also his servants, and who were alleged to have accompanied him to Mohan's field, armed with *lathis*, or sticks, were guilty of rioting. At the trial Bhojraj and the other servants were acquitted, and comments were made by the Sessions-Court Judge on the inconvenience of not being able to deal with the capital charge at a separate trial, in which there would have been greater freedom for the examination of the servants as witnesses. These, however, made statements at the trial which supported the defence set up by Dal Singh, the character of which was briefly as follows: He stated that on the day of the murder, about two in the afternoon, he was riding on his way from Hardua to Jubbulpore, accompanied by Shankar, who was on foot. When he reached a certain field Mohan and Jhunni, who were stated to have been hiding in the underbush, assaulted him with sticks. On being struck, he went on to the station house at Patan, calling at Singhori on the way, where he got his relative, Himmat Singh, to accompany him to Patan. He stated that at the station he reported what had occurred to the native constable there, who took down what he said. The native sub-inspector in charge of the station, Harkishen, says that the report was taken down from Dal Singh's narrative in his (Harkishen's) presence, and was afterwards signed by Dal Singh. The latter had a wound on the head, for the treatment of which he was sent to the neighbouring hospital. Meantime there arrived at the station Jhunni, the brother of Mohan, and one Parbat, who stated in the box that he had been attracted to the scene of the murder by the shouting of Mohan, and

had been requested to go with Jhunni to report to the police. Jhunni and Parbat reported the murder, and the officer in charge, after questioning them, sent for Dal Singh from the hospital and arrested him.

It is important to compare the story told by Dal Singh when making his statement at the trial with what he said in the report he made to the police in the document which he signed, a document which is sufficiently authenticated. The report is clearly admissible. It was in no sense a confession. As appears from its terms, it was rather in the nature of an information or charge laid against Mohan and Jhunni in respect of the assault alleged to have been made on Dal Singh on his way from Hardua to Jubbulpore. As such the statement is proper evidence against him. The statement is as follows :—

"To-day" (the day on which Kalia was murdered) "at 4 P.M., I went from Hardua, taking my servant, Shankar, son of Girdhari Khangar, with me, to the *kachhra* [field] of Nania Mallah to call Mohan Mallah ; because this morning he had been to work at my place, and, leaving the work before he had finished it, he had run away. His plough had been requisitioned for sowing purposes. I said to him, 'Come to work.' He replied, 'I will not go.' Thereupon I spoke to him harshly, for which Mohan struck me at once with a *lathi* on the right side of my head, and his brother, Jhunni, hit me once with a *lathi* on my back. Therefore I, becoming unconscious, fell from my horse. My servant, Shankar, cried out, and Maniram Kotwar and Bhojraj Lodhi came there. [Thereupon] these people ran away, and Shankar, Bhojraj [and] Maniram raised me and carried me home. And Jhunni and Mohan have beaten their *dukariya* [old woman] with *lathis*, and are making preparations to bring a false case against me. Possibly they are coming to make a report."

It will be observed that this statement is at several points at complete variance with what Dal Singh afterwards stated in Court. The Sessions Judge regarded the document as discrediting his defence. He had to decide between the story for the prosecution and that told for Dal Singh. In considering his judgment, in which the evidence is examined fully,

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their Lordships do not propose to follow him in examining in that judgment the details he deals with. They have observed no material point in which he appears to have gone wrong. They are aware that the Sessions Judge tried the case with two native assessors who differed from his conclusion. But these assessors gave no reasons for so differing which their Lordships can consider adequate. The Sessions Judge had before him as witnesses whom he believed, Mohan and Jhunni, who testified to having been present when the murder took place and to the details of the account of it given for the prosecution. He also had before him a number of witnesses called for Dal Singh to establish his version of the events of the afternoon of the day on which Kalia lost her life. The Judge held that their testimony was untrustworthy because of serious discrepancies between the versions given by the various witnesses, and on other grounds. In the main he accepted the narrative given by Mohan and Jhunni, and, as he held, confirmed by the facts established. Their Lordships have scrutinised the evidence in order to see whether any miscarriage of justice of the exceptional kind already defined has taken place. So far from finding any such miscarriage in the proceedings at the trial, they see no reason for differing from the conclusions come to by the presiding Judge, or from the reasons given by him in weighing the credibility of the witnesses. They have formed the same impression as he did of the probabilities of the two stories, as well as of the effect of the medical evidence. Had the decision been given solely on the testimony of the witnesses called at the trial and such documents as were plainly admissible, the proceedings would have given rise to no question of substance. The learned Judge who tried the case gave his judgment to so large an extent on proper materials that,

even if, here and there, he alludes to documents which were not properly in evidence, he has in no case done so in such a fashion as to imperil the conclusion at which he arrived, tested by the standard of substantial justice.

But in the Court of Appeal further material was brought under consideration, and it is in this connection that more difficult questions have been raised. The Court of Appeal might, in their Lordships' opinion, have properly dismissed the appeal on the simple ground that an examination of the evidence on the record disclosed no reason to differ from the finding of the Judge who tried the case. But they were not content to confine themselves to this safe ground, for, although they expressed substantial agreement with the reasons he gave, they went on to take into consideration the police diary made during the preparation of the case and antecedently to the trial. The question which has now to be considered is whether the appearance of this feature in the judgment of the Court of Appeal vitiates the judgment and confirmation required by the Criminal Procedure Code.

Under section 172 of the Code every police officer making an investigation is to enter his proceedings in a diary, and any Criminal Court may send for the police diaries of a case under enquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. Such a diary was kept in the present case and the Judge who tried it had the diary before him. Under Part VII of the Code an appeal is permitted, subject to certain restrictions, and an appeal was brought to the Court of the Judicial Commissioner in the present case, and was heard by two Judges. By section 374, when the Court of Session passes sentence of death, the proceedings are to be submitted to the High Court (in this

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instance the Court of the Judicial Commissioner), and the sentence is not to be executed unless it is confirmed by the High Court. On the 19th April, 1916, the sentence on Dal Singh was confirmed by the Court of the Judicial Commissioner "for the reasons given in our judgment of this date" on the appeal.

Had the Court of Appeal simply taken the same course as the Sessions Judge and affirmed his judgment on the evidence on the record, it is evident that the conviction would not have been reviewed by this Board. For, as their Lordships have already stated, there was adequate and proper evidence upon which that Judge could and did convict. The Judges in the Court of Appeal considered this evidence, and did not differ on any material point from the view he took of it. But, apparently with the view of making their opinion still more conclusive, they went on, after examining the evidence of the witnesses and testing the credibility of those called for the defence by referring to the discrepancies in the testimony of the witnesses on which the trial Judge had properly dwelt, to test that testimony still further by reading the earlier statements of these witnesses made to the police and entered in the police diary. In other words, they treated what was thus entered as evidence which could be used at all events for the purpose of discrediting these witnesses. In their Lordships' opinion, this was plainly wrong. It was inconsistent with the provisions of section 172 of the Criminal Code. To use the diary for the purpose they did was to contravene the rule laid down in *Queen-Empress v. Mannu* (1), where a full Court pointed out that such a diary may be used to assist the Court which tries the case by suggesting means of further elucidating points which need clearing up, and which are material for the purpose of

(1) (1897) I. L. R. 19 All. 390.

doing justice between the Crown and the accused, but not as containing entries which can by themselves be taken to be evidence of any date, fact, or statement contained in the diary. The police officer who made the entry may be confronted with it, but not any other witness.

The question which arises is, therefore, whether the improper use made of the entries by the Court of Appeal is a sufficient reason why the Judicial Committee should recommend interference with the judgment and sentence. In their Lordships' opinion, it is not such a reason. They have already stated that they have no ground for doubting that the trial Judge properly convicted and sentenced Dal Singh. He then had an appeal heard by the proper Court, and the sentence was confirmed by that Court. The conditions of the Code as to jurisdiction have thus been complied with. The Court of Appeal had before it evidence on which it placed reliance, and on which it could properly have based its affirmance and confirmation of the conviction. It plainly went wrong in using the diary. Now it is true that error in procedure may be of a character so grave as to warrant the interference of the Sovereign. Such error may, for example, deprive a man of a constitutional or statutory right to be tried by a jury, or by some particular tribunal. Or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed. Even if their Lordships thought the accused guilty, they would not hesitate to recommend the exercise of the prerogative, were such the case. But where the error consists only in the fact that evidence has been improperly admitted which was not essential to a result which might have been come to wholly independently of it, the case is

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different. The dominant question is the broad one whether substantial justice has been done, and, if substantial justice has been done, it is contrary to the general practice to advise the Sovereign to interfere with the result. The point in the present appeal is therefore whether, looking at the proceedings as a whole and taking into account what has properly been proved, the conclusion come to has been a just one.

In the result their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. There will, as hitherto has been usual in such cases, be no order as to costs.

J. V. W.

Appeal dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitor for the respondent: *The Solicitor, India Office.*

CIVIL RULE.

Before Mookerjee and Cuming JJ.

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MANINDRA CHANDRA NANDY.*

Administration Suit—Procedure and Practice—Valuation of suit—Creditor's action against trustee for administration of trust and for accounts—Plaintiff representing body of creditors—Jurisdiction—Civil Procedure Code (Act V of 1908), O. XXI, r. 13, App. A. No. 41 and D. Nos. 17-20—Court Fees Act (VII of 1870) ss. 7 (iv) (f), 11; Sch. II, Art. 17 (vi)—Suits Valuation Act (VII of 1887), s. 8.

An administration suit by a creditor is an action for account within the meaning of s. 7 (iv) (f) of the Court Fees Act. In such a suit the plaintiff is entitled to place his own valuation on the relief claimed.

* Civil Rule No. 372 of 1916, against the order of Benode Behari Mitra, Subordinate Judge of 24-Parganas, dated April 6, 1916.

On the analogy of section 11 of the Court Fees Act, after the preliminary decree has been made in a creditor's suit for administration and the other creditors have been invited to establish their claim, if any, against the debtor, each creditor who puts forward a claim not already transformed into a judgment debt, may well be required to pay court-fees *ad valorem* on his application, as if it were a plaint in a suit for the recovery of the sum he claims.

The valuation for the purpose of jurisdiction must be identical under s. 8 of the Suits Valuation Act, with the valuation for the purpose of court-fees.

Where a suit is valued on the basis of the claim of the plaintiff and instituted in the Court of the lowest grade of pecuniary jurisdiction and a claim is thereafter preferred by a creditor, who could, in respect of his claim, institute a suit only in a Court of higher grade, the remedy will be the transfer of the suit at that stage from the Court of the lowest grade to the Court competent to try a claim of enhanced value.

RULE obtained on behalf of Shashi Bhushan Bose, the petitioner.

On the 4th April, 1911, Shashi Bhushan Bose lent one Amarnath Bose the sum of Rs. 1,000 on a promissory note repayable on demand. On the 23rd September, 1911, Amarnath Bose transferred all his moveable properties by a deed of trust in favour of the Maharaja of Cossimbazar and directed him to pay up all his creditors including the petitioner. On the 3rd April, 1914, not having received from the trustee, who had taken possession of the trust properties, payment of the amount due to him on the promissory note, Shashi Bhushan Bose instituted a suit against Amarnath Bose and the Maharaja of Cossimbazar for the recovery of Rs. 1,000 as principal and Rs. 540 by way of interest at 18 per cent. per annum, aggregating the sum of Rs. 1,540. In the plaint he alleged, *inter alia*, that, so far as he was aware, the trustee had not paid up the other creditors of Amarnath Bose, and asked by way of relief for the administration of the estate, for an account to be taken of the trust properties and the

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income thereof, for the appointment of a receiver for the purpose, for the ascertainment of the creditors of Amarnath Bose by issue of public notice, for the determination and payment of their debts to them and, finally, for leave to conduct the suit on his own behalf as well as on behalf of all the other creditors with liberty to the other creditors to join as co-plaintiffs should they so desire. For the purposes of jurisdiction, the plaintiff valued the suit at Rs. 6,540, alleging that the sum due to him was Rs. 1,540, and the sums due to the other creditors would exceed Rs. 5,000. He paid *ad valorem* court-fees, namely, Rs. 105, on the valuation of his own claim of Rs. 1,540 and an additional court-fee of Rs. 10 for the other reliefs claimed in the suit. Subsequent to the institution of the suit Amarnath Bose died and on the 29th March, 1915, his heirs and representatives were substituted as defendants. After the suit had advanced considerably, it came on for hearing on the 6th April, 1916, when a preliminary objection on the question of court-fees payable by the plaintiff was raised by the defendant. The Subordinate Judge directed that the plaintiff should pay *ad valorem* court-fee upon the exact amount of the debts of Amarnath Bose, for the ascertainment of which the plaintiff could, if so advised, adduce evidence on the point; and on his failure to do so he would have to pay *ad valorem* court-fee upon the amount of debts as mentioned in the trust-deed. The plaintiff, thereupon, applied to the High Court for a Rule on the Maharaja and the heirs and representatives of Amarnath Bose to set aside this interlocutory order.

Babu Jogesh Chandra Roy, Babu Gobinda Chandra Dey Roy and Babu Upendra Kumar Roy, for the petitioner.

Dr. Dwarkanath Mitra, for the opposite party.

The Senior Government Pleader (Babu Ram Charan Mitra), for the Secretary of State.

Cur. adv. vult.

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MOOKERJEE AND CUMING JJ. We are invited in this Rule to set aside an interlocutory order in an administration suit instituted by a creditor. The order in question calls upon the plaintiff to amend his plaint in the manner following, namely, to ascertain all the creditors of his debtor and the sums payable to them, to alter the valuation of the claim by the addition of the amount so ascertained, to the amount due to himself, and to pay court-fees *ad valorem* on the amended valuation. The plaint recites that the first defendant, Amarnath Bose, on the 4th April 1911 borrowed from the plaintiff a sum of Rs. 1,000 on a promissory note repayable on demand with interest at 18 per cent. per annum, that he has neither paid the principal nor the interest, and that on the 23rd September 1911, he executed a trust deed in favour of the second defendant, the Maharaja of Cossimbazar, whereby he transferred all his immovable properties to the Trustee with direction to pay up all his creditors inclusive of the plaintiff. The plaint further recites that the Trustee has taken possession of the trust properties, but has not paid the plaintiff his dues, and so far as the plaintiff can ascertain, the Trustee has not paid up the other creditors of the first defendant. The plaintiff, accordingly, prays that the estate may be administered, that an account may be taken of the trust properties and their income, that a receiver may be appointed for the purpose, that the creditors may be ascertained by issue of public notice, and that their debts may be determined and paid. The plaintiff also asks for leave

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to conduct the suit on behalf of all the creditors with liberty to the other creditors to join as co-plaintiffs, should they so desire. The plaintiff alleges that the sum due to him on the date of the commencement of the suit was Rs. 1,540, and that the sums payable to the other creditors would exceed Rs. 5,000. He valued the suit for purposes of jurisdiction at Rs. 6,540, but paid court-fees on his own claim only, viz., Rs. 105 on a valuation of Rs. 1,540. He paid an additional sum of Rs. 10, apparently on the ground that the claim for administration could not be estimated at a money value within the meaning of Sched. II, Art. 17 (vi) of the Court Fees Act, 1870. This suit was instituted on the 3rd April, 1914, and after it had advanced considerably, it came up for hearing on the 6th April, 1916, when a preliminary objection was taken on the question of court-fees payable on the plaint. It may be stated that the first defendant, the debtor, had died meanwhile, and his infant heirs had been brought on the record on the 29th March, 1915. The Subordinate Judge took up the question of court-fees and made the order we are now called upon to revise. The question raised is one of first impression, and we have had the advantage of arguments not only on behalf of the plaintiff and the trustee defendant but also by the Senior Government Pleader who appeared on behalf of the Secretary of State as a question of the Revenues of the Crown was concerned.

It is plain that the Court Fees Act, 1870, does not in express terms provide for an administration suit. We must consequently consider the nature of an administration suit, which is explained in standard treatises on Equity Pleading and Chancery Practice. Lord Redesdale (Pleadings in Chancery, page 167) points out that, as early as 1766, in *Corry v. Trist*, some of a number of creditors, parties to a trust deed for

payment of debts, were permitted to sue, on behalf of themselves and the other creditors named in the deed, for execution of the trust, although one of those creditors could not in that case have sued for a single demand without bringing the other creditors before the Court: *Worraker v. Pryer* (1). This seems to have been permitted purely to save expense and delay; if a great number of creditors, thus specially provided for by a deed of trust, were to be made plaintiffs, the suit would be liable to the hazard of frequent abatements; and if many were made defendants, the same inconvenience might happen and additional expense would unavoidably be incurred. Reference may, in this connection, be made to the decisions in *Routh v. Kinder* (2), *Boddy v. Kent* (3), *Weld v. Bonham* (4), *Douglas v. Horsfall* (5), *Handford v. Storie* (6), *Peacock v. Monk* (7), *Newton v. The Earl of Egmont* (8), *Atherton v. Worth* (9), *Richardson v. Hastings* (10), *Smart v. Bradstock* (11) and *Powell v. Wright* (12). Reference may also be made to an instructive exposition given by Story in his work on Equity Pleadings (sections 99-103 (a) and 216-218), where it is pointed out that the suit must be framed as on behalf of all the creditors, as otherwise accounts may have to be taken *de novo* in separate suits by different claimants: *Leigh v. Thomas* (13). The suit is in essence for an account and application of the estate of the debtor for the satisfaction of the dues of all the creditors; the whole administration and

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(1) (1876) 2 Ch. D. 109.

(2) (1789) 3 Swans 144n.

(3) (1816) 1 Meriv. 361.

(4) (1824) 2 Sim. & Stu. 91.

(5) (1825) 2 Sim. & Stu. 184.

(6) (1825) 2 Sim. & Stu. 196.

(7) (1748) 1 Ves. (Senr.) 127.

(8) (1831) 4 Sim. 574;

(1832) 5 Sim. 130.

(9) (1764) 1 Dick. 375.

(10) (1844) 7 Beav. 323.

(11) (1844) 7 Beav. 500.

(12) (1844) 7 Beav. 444.

(13) (1751) 2 Ves. (Senr.) 312.

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settlement of the estate are assumed by the Court, the assets are marshalled, and the decree is made for the benefit of all the creditors. [See Civil Procedure Code, 1908, Order XX, rule 13, App. A. 41; App. D. 17-20; *Good v. Blewitt* (1), *Adair v. New River Co.* (2) and *Cockburn v. Thompson* (3)]. Creditors other than the plaintiff may come in under the decree and prove their debts and obtain satisfaction of their demands, equally with the plaintiff in the suit, and under such circumstances, they are treated as parties to the suit. If they decline so to come in, they will be excluded from the benefit of the decree, and yet they will, from necessity, be considered as bound by the acts done under the authority of the Court. [*Hallett v. Hallett* (4) where Chancellor Walworth expounds the whole doctrine with great clearness.] But although such is the nature of the suit, it is well settled that where one creditor sues on behalf of himself and the others for administration of the estate of the debtor, the defendant may, at any time before judgment, have the action dismissed on payment of the plaintiff's debt and all the costs of the action: *Pemberton v. Topham* (5), *Holden v. Kynaston* (6) and *Manton v. Roe* (7); and this principle was recently applied in the case of *Athalur Malakondiah v. Lakshminarasimhalu Chetty* (8). An administration suit by a creditor is, consequently, an action for an account within the meaning of section 7 (iv) (f) of the Court Fees Act, and this was the view adopted in *Khatija v. Shekh Adam Husenally Vasi* (9). In such a suit, the plaintiff is entitled to place his own valuation on the relief

(1) (1815) 19 Ves. 336.

(2) (1805) 11 Ves. 429.

(3) (1809) 16 Ves. 327.

(4) (1829) 2 Paige 19.

(5) (1839) 1 Beav. 316.

(6) (1840) 2 Beav. 204.

(7) (1844) 14 Sim. 353.

(8) (1914) 26 Mad. L. J. 312.

(9) (1915) L. L. R. 39 Bom. 545 ;
17 Bom. L. R. 574.

claimed: *Ma Ma v. Ma Hmon* (1). In the present instance, he values the relief at Rs. 1,540, and that valuation is neither arbitrary nor fictitious. We are not able to appreciate on what principle the plaintiff can be called upon to ascertain in advance all the creditors of his debtor and their dues, and value the suit accordingly. That in essence is the fundamental point for determination in the suit itself, and it is inconceivable how it can be decided by the plaintiff before trial. We do not feel pressed by the argument of the Senior Government Pleader that if the plaintiff is allowed to value the suit according to the relief he seeks, the Revenues of the Crown will suffer, because the other creditors of the debtor will obtain relief without payment of court-fees. There need not, in our opinion, be room for such apprehension.

When, after the preliminary decree has been made and creditors have been invited to establish their claims, if any, against the debtor, each creditor, who puts forward a claim not already transformed into a judgment debt, may well be required to pay court-fees *ad valorem* on his application, as if it were a plaint in a suit for the recovery of the sum he claims. Such a procedure can be sustained on the analogy of section 11 of the Court Fees Act. The only real difficulty in connection with the matter is the question of jurisdiction. If the suit is, as we think it must be, treated as a suit for "account," within the meaning of section 7 (iv) (f) of the Court Fees Act, the valuation for purposes of jurisdiction must be identical, under section 8 of the Suits Valuation Act, with the valuation for purposes of court-fees. It is thus conceivable that the suit so valued on the basis of the claim of the plaintiff, may be instituted in the Court of the lowest grade of pecuniary jurisdiction, and a

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(1) (1906) 4 L. B. R. 279.

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claim may thereafter be preferred by a creditor who could, in respect of his claim, institute a suit only in a Court of higher grade. The remedy in such a case would be the transfer of the suit at that stage from the Court of lowest grade to the Court competent to try a claim of enhanced value. This course was in fact adopted in a somewhat similar case: *see* the decision in *Bhupendra Kumar Chakravarty v. Purna Chandra Bose* (1). The view we take thus obviously avoids all anomaly and at the same time removes all hardship. In the case before us, there is in reality no difficulty, actual or potential. Since the institution of the suit, several creditors of the first defendant have put forward claims of a value such as can be tried only by subordinate Judges. The suit is, therefore, properly triable by a subordinate Judge, and as the aggregate value of the claims already put forward exceeds ten thousand rupees, the appeal against the decree will lie, not to the District Judge but to this Court. We may here point out that the claimants who subsequently appeared, should not have been formally joined as plaintiffs, specially as some of them are said to have already obtained decrees on their claims, unless, indeed, it was alleged and proved that their interests would be in serious jeopardy if the plaintiff had the conduct of the proceedings: *Vassonji Tricumji & Co. v. Esmailbhai Shivji* (2). The proper course would have been to allow them an opportunity to prove their claims and to participate in the distribution of the assets of the estate. Our conclusion is that it was not obligatory upon the plaintiff to pay court-fees on a higher valuation than the amount claimed by him, and that the plaint is not open to objection on the ground that it is insufficiently stamped.

(1) (1910) I. L. R. 43 Calc. 650.

(2) (1909) I. L. R. 34 Bom. 420 ;

11 Bom. L. R. 1054.

The result is that this Rule is made absolute and the order of the Court below discharged. The records will be returned to the Subordinate Judge so that he may proceed with the trial of the suit on the merits on as early a date as practicable. The petitioner will have his costs of this Rule from the estate of his debtor in the hand of the Trustee-defendant.

O. M.

Rule absolute.

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INSOLVENCY JURISDICTION.

Before Sanderson C. J. and Mookerjee J.

MALCHAND

v.

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Nov. 17.

Insolvency—Debtor and creditor—Adjudication—Debtor presenting his own petition—Application for discharge—Abuse of process of Court—Jurisdiction to annul adjudication—Presidency Towns Insolvency Act (III of 1909) ss. 14, 15, 21, 38—Rules of the Insolvency Act, 1909, rule 142(a).

Where debtors were adjudicated insolvents and an order for annulment of that adjudication was made, and the debtors subsequently presented their petition to be again adjudicated insolvents on the same materials and in respect of the same debt and the same creditors as in their prior application for adjudication :

Held, that the subsequent application to be adjudged insolvents was an abuse of the process of the Court and that the Court had jurisdiction to annul the latter adjudication in insolvency.

Ex parte Painter (1), *In re Betts* (2), *In re Hancock* (3), *In re Archer*

*Appeal from Original Order, No. 32 of 1916, in Insolvency Case No. 78 of 1915.

(1) [1895] 1 Q. P. 85.

(2) [1901] 2 K. B. 39.

(3) [1904] 1 K. B. 585.

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(1), *Samiruddin v. Kadumoyi Dasi* (2), *Ponnusami Chetti v. Narasimma Chetti* (3), *Triloki Nath v. Badri Das* (4), *Re Aranvayal Sabhapathy Moodliar* (5) and *Uday Chand Maity v. Ram Kumar Khara* (6) referred to.

APPEAL by Mal Chand and another, the insolvents, from the judgment of Greaves J.

On the 25th June, 1906, Malchand and another were adjudicated insolvents on their own petition and no dividend whatsoever was paid on their debt which amounted to the sum of Rs. 5,000. On the 7th August, 1906, they made an application to the Court for their personal discharge and obtained the same; but no order for their final discharge was ever obtained by them. Subsequently, on the 12th December, 1912, they were again adjudicated insolvents on their own petition. Their debts in this second insolvency proceeding amounted to Rs. 11,000 odd. There were, however, no assets and no steps were taken by the insolvents to pay their creditors. On the 2nd February, 1915, the Official Assignee obtained an order under Rule 142 A, from the Court, for the annulment of the adjudication. On the 9th February, 1915, the principal creditors of the insolvents in the second insolvency proceedings instituted a suit to enforce their claims against the latter, and served them with a notice of the suit on the 22nd February, 1915. On the same date the insolvents deposited the sum of Rs. 50 with the Official Assignee with a view to the presentation of another petition of insolvency. On the 5th March, 1915, they presented their third petition on the same materials and in respect of the same debts and the same creditors as in their application for the second adjudication, and on that date obtained their third order for adjudication. On the 13th March, 1915,

(1) (1904) 20 T. L. R. 390.

(4) (1914) I. L. R. 36 All. 250.

(2) (1910) 12 C. L. J. 445.

(5) (1897) I. L. R. 21 Bom. 297.

(3) (1913) 25 Mad. L. J. 545.

(6) (1910) 12 C. L. J. 400.

the creditors filed their petition for the annulment of the order of adjudication. The matter came on for hearing before Mr. Justice Chaudhuri by way of review of the order of the 2nd February, 1915, annulling the adjudication, and the application for review was dismissed on the ground that the Court was not justified in receiving the order. Subsequently, an application was made to Mr. Justice Greaves by the insolvents for their discharge and at the same time one of the creditors opposed the discharge and applied for the annulment of the adjudication of the 5th March, 1915, and on the 14th March, 1916, Mr. Justice Greaves delivered judgment, refusing the application for discharge and setting aside the order of adjudication. The insolvents, thereupon, appealed.

Mr. A. N. Chaudhuri (with him *Mr. B. C. Ghosh*), for the appellants. The portion of the order which refused the discharge of the appellants was not challenged, and the reasons set out in the judgment for annulment were not good reasons. Mr. Justice Greaves had no jurisdiction to pass an order annulling the adjudication of the appellants. The Presidency Towns Insolvency Act did not give him any jurisdiction in cases of this description to annul the adjudication. Section 21 of this Act dealt with the powers of the Court to annul adjudication, but this section had no application to the present case. Section 9 defined what were acts of insolvency and cl. (c) of that section was referred to, as also section 38 (2), 39, 102 and 103. The only other section under which the Court might annul the adjudication was section 30. Sections 28 and 29 were referred to: see also *Ex parte Painter* (1), where it was held that the adjudication was not to be annulled.

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Mr. P. N. Chatterji, for the respondent Gopal Chandra Ghosal. Mr. Justice Greaves had ample jurisdiction to pass an order annulling the adjudication. The words in section 21 of the Insolvency Act were very wide and gave the Court ample discretion in matters of this character, and in the exercise of that discretion Mr. Justice Greaves passed the order. There was nothing to prevent the appellants going on with the second insolvency. The conduct of the appellants in presenting petition after petition in insolvency amounted to a gross abuse of the process of the Court, and the Court took such conduct into account in passing the order that it did. The case of *Ex parte Painter* (1) was distinguishable from the present case. In that case there was only one insolvency, whereas there were three insolvencies in the present case. The case of *In re Betts* (2) was relied on. The facts that the appellants had been guilty of undue preference and that they had no books of account, set out as reasons in the judgment for annulling the adjudication, did not exhaust all the reasons for annulment. In addition to these reasons there was the further ground, namely, that Mr. Justice Greaves took all the attendant circumstances of the case into account and then came to the finding that the appellants ought not to have been adjudged insolvents for the third time. On such finding he annulled the third adjudication.

Mr. A. N. Chaudhuri, in reply. An adjudication order could be made at any time after the debtor's application. A previous order annulling an insolvency was not a bar to a debtor coming in with a fresh application for insolvency on the same facts. Any fresh cause was a good ground for making the application.

(1) [1895] 1 Q. B. 85.

(2) [1901] 2 K. B. 39.

SANDERSON C. J. This is an appeal from a judgment of Mr. Justice Greaves which was delivered on the 14th day of March in this year.

The appeal was based upon two grounds: *first*, that the learned Judge had refused an order to discharge the insolvents; and, *secondly*, that he had made an order annulling the adjudication in insolvency.

The learned counsel, who appeared for the insolvents, the appellants, has not pressed the first ground. Therefore, it is not necessary for us to say anything about it.

The point which has been argued is the second one, namely, that the learned Judge ought not to have made an order annulling the adjudication.

The argument is based upon two grounds: *first*, it is argued that the learned Judge had no jurisdiction to make the order; *secondly*, that if he had jurisdiction he ought not to have exercised it in the way in which he did, namely, by making an order of annulment.

The facts in this case are somewhat peculiar. It appears that the appellants, the insolvents, were adjudicated bankrupt as long ago as the 25th of June, 1906. On the 7th of August, 1906, they obtained their personal discharge, but there never was any final discharge, and, apparently, those proceedings seem to have got into abeyance by the consent of all parties concerned. Then, on the 12th of December, 1912, the appellants again presented a petition, and upon that petition they were again adjudicated insolvents. The debts of the respondent creditors had been incurred before December, 1912. I do not know the exact date, but it was certainly before the date of the second insolvency. On the 2nd of February, 1915, over two years after the adjudication, the Official Assignee applied to the Court for the annulment

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of the adjudication, on the ground that the rules of the Court had not been complied with: and, the particular rule in question was Rule 142A which provides "where an insolvent does not apply to the Court for his discharge under section 38 of the Act for a period of eighteen months from the date of the order of adjudication, the Court on the application of the Official Assignee or of a creditor may annul the adjudication or make such order as it may think fit." An application was made under that rule, and the learned Judge, who heard the application, made an order annulling the adjudication. Therefore, the second insolvency came to an end by the order of the Court. Seven days after the adjudication was annulled, the creditors, the respondents in this appeal, brought a suit against the debtors: and on the 22nd of February a notice of the suit was issued and served upon the debtors. On the same date, the debtors began to take steps with a view to the presentation of another petition in insolvency, and on that date they deposited the sum of Rs. 50 with the Official Assignee. On the 5th March, the debtors presented their third petition, and, an adjudication was made on the same day. On the 13th of March the creditors, the respondents in this appeal, put in a petition asking that this order of adjudication should be annulled. The proceedings then apparently came before Mr. Justice Chaudhuri, and at his suggestion, an application was made by the debtors that the order of the 2nd of February, 1915, annulling the adjudication should be reviewed. The learned Judge heard the application for review, and came to the conclusion that there was no ground to justify him in reviewing the order, and he dismissed the application. The result was that the order of the 2nd of February, 1915, annulling the second insolvency stood.

Then the matter came before Mr. Justice Greaves, and an application was made to him by the debtors for their discharge, which he refused, and that point, as I have already said, has not been argued in this appeal. An application was made by the creditors, the respondents in this appeal, that the adjudication of the 5th of March should be annulled.

The learned Judge came to the conclusion that the order of adjudication ought not to have been made and he set it aside. The grounds upon which he based his judgment were as follows: "Here you have two insolvents, adjudicated on their own petition, guilty of an offence under the Insolvency Act in preferring an old creditor with what object, except to advantage themselves in some way, it is difficult to say. They have got no books of account, and so far as I can see, they seem to me to be seeking to take advantage of the provisions of the Insolvency Act in order to shelter themselves from such proceedings as the creditors may be advised to take against them."

Now, it is not necessary for me to say whether I entirely agree with the ground on which the learned Judge based his judgment, for I think that the appeal ought to be dismissed on another ground altogether. It is admitted that the application for the third adjudication order, viz., that of the 5th of March, 1915, was made on the same materials as the application for the second adjudication order. The debts were the same; the creditors were the same; and the learned Judge has treated the third insolvency and the second insolvency practically as one insolvency. The learned counsel who argued this appeal, has not disputed that that was in fact a fair way of looking at it. Then the result is this, that on the 2nd of February, 1915, an order was made by this Court putting an end to the insolvency,

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and then on the 5th of March, practically a month afterwards, an order was made adjudicating the debtors insolvent. There was no difference in the circumstances—the same debts, the same creditors; and, the application was made on the same materials as the application in the second insolvency. The question arises whether the learned Judge in these circumstances had jurisdiction to make an order annulling the adjudication. In my opinion he had. The section under which he acted was section 21 which provided that “where, in the opinion of the Court, a debtor ought not to have been adjudged insolvent, or where it is proved to the satisfaction of the Court that the debts of the insolvent are paid in full, the Court may, on the application of any person interested, by order annul the adjudication.” These words are in effect the same words which were used in the English Bankruptcy Act of 1883, section 35. In the case of *Ex parte Painter* (1), it was held that the Court had jurisdiction under that Act to make the order of annulment, if it thought that the application for bankruptcy was made as an abuse of the process of the Court: or, to use the words of the learned Judge Mr. Justice Vaughan “for a purpose foreign to the Bankruptcy Laws.” I am of opinion that the learned Judge in this case had jurisdiction to make the order, if he thought that the application for the third insolvency was an abuse of the process of the Court. Now, was it an abuse of the process of the Court under the circumstances of this case? I listened with great attention to the argument of the learned counsel, and the main part of his argument was that a debtor, if he comes to the Court and shows that he is unable to pay his debts, is entitled for his protection, to get adjudication in insolvency. There-

(1) [1895] 1 Q B. 85.

fore, I put to him, in order to test the principle, whether, if, on the 2nd of February, 1915, an order was properly made annulling the order of adjudication in insolvency, the same debtor could come to the Court on the following day on exactly the same facts, alleging that he was unable to pay his debts and was entitled to an order of adjudication in insolvency. The learned counsel was not prepared to argue that he was. Then I ask what is the difference in principle if the second order is made on the 5th of March instead of the day following the 2nd February, provided no new circumstances have arisen; I see no difference. In this case no new circumstances have arisen between the 2nd February and the 5th of March. In my judgment, the learned Judge was right in annulling the adjudication in insolvency.

But the point, with which I have now been dealing, apparently was not taken before Mr. Justice Greaves—certainly it is not referred to in his judgment—and it was only argued at a late period of this appeal, and, in these circumstances, I think that the appeal must be dismissed without costs.

MOOKERJEE J. I agree that the order of Greaves J. must be maintained, though not on the grounds assigned by him. The order was made for annulment of an adjudication under section 21 (1) of the Presidency Insolvency Act, 1909, which provides that where, in the opinion of the Court, a debtor ought not to have been adjudged an insolvent, the Court may, on the application of any person interested, by order annul the adjudication. Whether a debtor ought or ought not to have been adjudged an insolvent must obviously be determined with reference to the point of time when the order of adjudication was made. Section 14 defines the conditions on which a debtor may present a

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petition for insolvency. Sub-section (1) of section 15 then lays down that a debtor's petition shall allege that the debtor is unable to pay his debts; and if he proves that he is entitled to present a petition, that is, if he establishes the conditions mentioned in section 14, the Court may thereupon make an order for adjudication, unless, in its opinion, the petition ought to have been presented before some other Court having insolvency jurisdiction. Consequently, if the debtor alleges and proves that he is unable to pay his debts and that his debts amount to Rs. 500 he is *prima facie* entitled to an order of adjudication. In the present case, it is not disputed that the debts amount to upwards of Rs. 500, and the debtors are unable to pay their debts. Consequently, the order of adjudication was *prima facie* properly made. But it is urged that the order of adjudication should not have been made, because the application whereon it was obtained was in essence an abuse of the process of the Court. This raises the question whether it is obligatory upon a Court to grant an application in insolvency merely because the debtor satisfies the Court that the conditions mentioned in sections 14 and 15 exist in his case.

Under the law of England, it is well settled that when the presentation of a petition is an abuse of the process of the Court, the Court may decline to make any order on it or may rescind the receiving order made on the petition. This principle was recognised in the cases of *In re Betts* (1), *Ex parte Painter* (2), *In re Hancock* (3), *In re Archer* (4), and has been applied by all the Indian High Courts. It was indicated as applicable to the Provincial Insolvency Act in the

(1) [1901] 2 K. B. 39.

(2) [1895] 1 Q. B. 85.

(3) [1904] 1 K. B. 585.

(4) (1904) 20 T. L. R. 390.

case of *Samiruddin v. Kadumoyi Dasi* (1), and has been recently accepted by two Full Benches, one of the Madras High Court, the other of the Allahabad High Court, in the cases of *Ponnusami Chetti v. Narasimma Chetti* (2) and *Triloki Nath v. Badri Das* (3). [See also *Re Aranvayal Sabhapathy Moodliar* (4)]. We must take it then as well settled that notwithstanding proof of the existence of the conditions mentioned in the Statute, the Court is not bound to pass an order of adjudication where the application constitutes an abuse of the process of the Court; and it is the duty of the Court to have regard to this aspect of the matter when the question is raised. Let us consider the position of the appellants from this point of view.

In the case before us, the appellants applied for adjudication under the Indian Insolvency Act, 1848, on the 25th June, 1906. They obtained an order in their favour as also an order for personal discharge on the 7th August, 1906. This proceeding appears to have been subsequently abandoned, under circumstances which have not been explained. On the 12th December, 1912, after the Presidency Towns Insolvency Act had come into operation, they again applied to be adjudged insolvents. It may be mentioned here that in the interval their circumstances had materially altered; apparently, the amount of their debts, as also the number of their creditors, had increased. The order for adjudication was made as a matter of course; but no steps were taken for the payment of the dues of the creditors. The consequence was that on the 2nd February, 1915, an application was made to the Insolvency Court by the Official Assignee for an order under Rule 142A of the Rules of the Court.

(1) (1910) 12 C. L. J. 445.

(3) (1914) I. L. R. 36 All. 250.

(2) (1913) 25 Mad. L. J. 545.

(4) (1897) I. L. R. 21 Bom. 297.

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This rule provides that where an insolvent does not apply to the Court for his discharge under section 38 of the Act for a period of 18 months from the date of the order of adjudication, the Court, on the application of the Official Assignee or of a creditor, may annul the adjudication or make such order as it may think fit. The Court granted the application of the Official Assignee and the adjudication order was annulled. On the 9th February, 1915, the respondents, who are the principal creditors of the appellants, instituted a suit to enforce their claim, and the summons was served shortly afterwards. The result was that on the 5th March, 1915, the appellants again made an application to be adjudged insolvents. The application recited the previous history in this matter, and the Court made the order for adjudication as a matter of course. On the 13th March, 1915, the creditors made an application under section 21 for annulment of the order of adjudication. In my opinion, there is no escape from the conclusion that the application of the 5th March, 1915, was an abuse of the process of the Court. It is admitted that there had been no change whatever in the circumstances of the petitioners; in fact, the allegation whereon the application of the 12th December, 1912, was based were absolutely identical with those mentioned in the application of the 5th March, 1915. If an application of this character were entertained, the result would be inevitable that an insolvent would be encouraged to make an application for insolvency, to obtain an adjudication order, to take no substantial steps thereafter, or to abandon the proceedings, and, when pursued by his creditors again, to seek relief in the Insolvency Court whenever convenient to him. It would be lamentable if the Court were to countenance conduct of this character or to encourage liti-

gants to trifle with the Court in this manner. In the case before us, the order for annulment was properly made on the 2nd February, 1915; there is no suggestion that the Rule was improperly applied; and we have the significant fact that the order was confirmed on review. If, then, the order of the 2nd February, 1915, stands, it is difficult to see how the application of the 5th March, based on no fresh materials, could be properly maintained. On these grounds I hold that the order of Greaves J. must be supported.

But I desire to make it perfectly clear that I do not accept the view which appears to have commended itself to Greaves J., namely, that an adjudication order may be properly annulled under section 21 on the ground that the insolvent has shown undue preference to one creditor and has thus misconducted himself. This is not a ground on which an adjudication order can be legitimately refused, but is a matter to be taken into consideration only at a later stage of the proceedings in insolvency; this view was adopted in the cases of *Samiruddin v. Kadumoyi Dasi* (1), *Uday Chand Maity v. Ram Kumar Khara* (2), *Triloki Nath v. Badri Das* (3) and *Ponnusami Chetti v. Narasimma Chetti* (4).

As regards costs, I am inclined to take the view that the respondents are not entitled to their costs in this Court. The ground on which they now succeed was not urged in the Court below and was put forward in this Court only at a late stage of the argument after all the facts had been investigated. The appeal will, therefore, be dismissed without costs.

O. M.

Appeal dismissed.

Attorney for the appellants : *Akhil Chandra Bose*

Attorney for the respondent : *S. M. Dutt.*

(1) (1910) 12 C. L. J. 445.

(3) (1914) I. L. R. 36 All. 250

(2) (1910) 12 C. L. J. 400.

(4) (1913) 25 Mad. L. J. 545.

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CRIMINAL REVISION.

Before Teunon and Beachcroft JJ.

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Dec. 12.

SIMHACHALAM

v.

EMPEROR.*

Jurisdiction—Criminal misappropriation or breach of trust—Receipt of money and conversion at head office of a company in Madras Presidency—Loss to complainant in a district in Bengal—Jurisdiction of Court at latter place to try the offences—Criminal Procedure Code (Act V of 1898), ss. 179, 181 (2).

The jurisdiction of a Court to try the offences of criminal misappropriation or breach of trust is governed by s. 181(2) and not s. 179 of the Criminal Procedure Code.

Loss, though a normal result, is not an ingredient of the offences of criminal misappropriation or breach of trust, and not, therefore, a "consequence" within the meaning of s. 179.

A complaint of offences under ss. 403 and 406 of the Penal Code against an official of an Insurance Company having its head office at B in the Madras Presidency, where the money was received and the conversion took place, cannot be tried by a Court at K where loss ensued to the complainant.

Ganeshi Lal v. Nand Kishore (1) and *Rambilas v. Emperor* (2) followed. *Queen-Empress v. O'Brien* (3) and *Langridge v. Atkins* (4) dissented from.

Colville v. Kristo Kishore Bose (5), *Emperor v. Mahadeo* (6), distinguished.

THE petitioner was the secretary of the Coromandel Life Insurance Company, Ltd., having its head office

* Criminal Revision No. 1004 of 1916, against the order of D. Dutt, Deputy Magistrate of Krishnagar, dated Sep. 16, 1916.

(1) (1912) I. L. R. 34 All. 487.

(4) (1912) I. L. R. 35 All. 29.

(2) (1914) Mad. W. N. 894.

(5) (1899) I. L. R. 26 Calc. 746.

(3) (1896) I. L. R. 19 All. 111.

(6) (1910) I. L. R. 32 All. 397.

at Bimlipatam in the Presidency of Madras. The Company had chief agents in various provinces in India and agents for local areas within the same. One Rati Kanta Laha insured his life with the said Company on the representation of Sarat Chunder Roy, who was the agent of the Company for the Sadar Subdivision of Krishnagar, in the district of Nadia, at the time acting under the Chief Agent for Assam and Bengal whose office was at Calcutta. In 1909 Rati Kanta was appointed the agent at Krishnagar and secured several subscribers. He resided at Krishnagar and used to send his own and the subscribers' premia by postal money-order from Krishnagar to the office of the Chief Agent at Calcutta who transmitted the same to the head office. It appeared that the Company later went into voluntary liquidation, and one P. Adinarayan, the managing director, was appointed the liquidator.

In March, April and May 1915, Rati Kanta sent the premia as usual, but failed to obtain a receipt therefor from the Company in spite of correspondence with the managing director. Accordingly, on the 30th March 1916, Rati Kanta filed a complaint, in the Court of the Sadar Subdivisional Magistrate of Krishnagar, against the petitioner and Adinarayan, of offences under ss. 403, 406 and 416 of the Penal Code. The money was received at Bimlipatam and it was not suggested that the conversion of it to the use of the accused took place anywhere else. Process at first issued only against Adinarayan under ss. 403 and 406 of the Penal Code, but he was ultimately discharged, on the 7th June, for want of jurisdiction. Upon the suggestion of the District Magistrate of Nadia, to whom an application had been made under s. 437 of the Code, the Subdivisional Officer summoned the petitioner, on the 17th July, under the same sections. The case

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was then transferred to Mr. D. Dutt, a Deputy Magistrate, for disposal. The petitioner took a preliminary objection to the jurisdiction of the Court to try him. The Magistrate overruled the same by his order of 16th September on the authority of *Queen-Empress v. O'Brien* (1). The petitioner then moved the High Court and obtained the present Rule.

Mr. K. N. Chaudhuri and Babu Debendra Narain Bhattacharjee, for the petitioner.

Babu Manmutha Nath Mukerjee and Babu Narendra Kumar Bose, for the complainant.

The offg. Deputy Legal Remembrancer (Mr. Camell) for the Crown.

Cur. adv. vult.

TEUNON AND BEACHCROFT JJ. The question for our consideration in this Rule is one of jurisdiction. The complainant has brought charges under sections 403, 406 of the Indian Penal Code in the Court of the Magistrate at Krishnagar in the district of Nadia, against the petitioner, an official of an Insurance Company having its head office at Bimlipatam in the Madras Presidency, alleging that he has misappropriated certain sums of money paid on account of an insurance policy. The question is whether the case can be tried in the Nadia Court.

Chapter XV of the Code of Criminal Procedure deals with the jurisdiction of Criminal Courts. Section 177 provides the general rule that an offence must ordinarily be tried in the Court within the local limits of whose jurisdiction it was committed. Then follow a number of enabling sections which extend the jurisdiction of Courts. One of these, section 181 (2), provides specially for the trial of the offence of

criminal misappropriation. By it the offence may be tried by a Court within the local limits of whose jurisdiction any part of the property, the subject of the offence, was received or retained as well as by the Court which is given jurisdiction by section 177.

Now, when the Code in express terms enumerates the Courts which have jurisdiction in language which is apparently exhaustive, if it is sought to establish the fact that another enabling section still further extends the jurisdiction, we must only give effect to the argument if the Court claiming jurisdiction comes strictly within the terms of the section.

The Crown contends that section 179 is such an enabling section. That section provides that "when a person is accused of the commission of an offence by reason of anything which has been done and of any consequence which has ensued, such offence may be tried by a Court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued." In the present case the money was received at Bimlipatam, and it is not suggested that the conversion of the property to the use of accused took place anywhere else. But it is argued that loss was caused to the complainant in Nadia and, therefore, by the application of section 179, the Nadia Court has jurisdiction.

Now, for the application of section 179 it is essential that the offence should depend on an act done and on a consequence which has ensued. But loss to one person, though a normal result of an act of misappropriation by another, is not an essential ingredient of the offence of criminal misappropriation. The offence is complete if the conversion is done with the intention of causing wrongful gain to the offender irrespective of any loss which may ensue to any other person. The offence does not depend on the consequence which

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has ensued but only on the act which has been done. Section 179, therefore, does not in terms apply.

There is no reported decision on the point in this Court. The case of *Colville v. Kristo Kishore Bose* (1) has no application, as the charge there was of cheating. In the Madras Court the case of *Rambilas v. Emperor* (2) is in favour of the petitioner. In the Allahabad Court there have been contrary decisions. The case of *Queen-Empress v. O'Brien* (3) which was followed in *Langridge v. Atkins* (4) supports the Crown, while that of *Ganeshi Lal v. Nand Kishore* (5) supports the petitioner. The case of *Emperor v. Mahadeo* (6) is not exactly in point as the Court held that the acts of embezzlement must have taken place at Mirzapur or at one of the districts in which the accused travelled. It also held that section 182 of the Code of Criminal Procedure was applicable. The cases of *Ganeshi Lal v. Nand Kishore* (5) and *Rambilas v. Emperor* (2), in our opinion, express the correct view.

The Rule is, therefore, made absolute and the proceedings against the petitioner are quashed.

E. H. M.

Rule absolute.

(1) (1899) I. L. R. 26 Cal. 746.

(4) (1912) I. L. R. 35 All. 29.

(2) (1914) Mad. W. N. 894.

(5) (1912) I. L. R. 34 All. 487.

(3) (1896) I. L. R. 19 All. 111.

(6) (1910) I. L. R. 32 All. 397.

ORIGINAL CIVIL.

Before Greaves J.

G. H. WITTENBAKER

v.

J. C. GALSTAUN AND OTHERS.*

1917

March 6.

School-master—Contract of service—Termination by notice—Reasonable notice, what is, in case of school-master—Custom, how proved.

One G. H. W. was appointed a teacher at the Armenian College, Calcutta, for a period of three years from the 1st March 1912. After the expiry of the period he continued in the emp'oy of the College until July 1916, when he received notice terminating his service as from the 1st August, and, in lieu of a month's notice, was paid a month's salary and a certain sum of money for a month's board and lodging:—

Held, that he was entitled to a reasonable notice and that in such a case, in the absence of misconduct, either three months' notice or a term's notice would be reasonable notice.

Todd v. Kerrieh (1) referred to.

Held, further, that, on the evidence adduced, no custom had been established by virtue of which the plaintiff's employment could be terminated by a month's notice. Usage is proved by the oral evidence of persons who become cognisant of its existence by reason of their occupation in the particular trade or business, and the evidence establishing custom or usage must be clear, convincing and consistent, and to prove an usage in a particular trade it must be shown that the usage is consistent and reasonable and was universally acquiesced in, and that everybody acknowledged it in the trade and knew of it or might know of it, if he took the pains to enquire.

ORIGINAL SUIT.

On the 28th February 1912, the plaintiff in this suit, Mr. G. H. Wittenbaker, was appointed Mathematical and English Master at the Armenian College for a period of three years from the 1st March 1912

* Original Civil Suit No. 1008 of 1916.

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at a salary of Rs. 150 a month with board and lodging. The plaintiff worked as such master from the date of his appointment until the month of July 1916.

On the 22nd July 1916, the plaintiff was verbally informed that his services would be dispensed with and, on the 26th July in that year, he received a written notice terminating his service as from the 1st August. In lieu of a month's notice he was paid Rs. 150 for one month's salary and Rs. 50 for a month's board and lodging. The plaintiff, however, continued to occupy his rooms in the College and received board and lodging until the 24th August without performing any duties. The plaintiff accepted the sums of Rs. 150 and Rs. 50, but without prejudice to his rights, and, after some correspondence brought, the present suit against the defendants, as two of the members of the governing body and as the managers of the Armenian College, to recover the sum of Rs. 1,490 as damages suffered by him for wrongful dismissal from his appointment. The plaintiff's claim was on the basis that he was entitled to be paid, in lieu of notice, salary, at the rate of Rs. 150 a month, from the 1st August 1916 to the end of January 1917, and a further sum of Rs. 150 a month for the same period for board, lodging, attendance, etc., and taking into consideration the Rs. 200 paid to him, and the fact that he had received board and lodging for about 24 days in August, the amount claimed was arrived at. The plaintiff's contention was that as a school-master and in the absence of misconduct he was entitled to notice up to the end of the current session, or at least one full term's notice, of the intention of the College authorities to dispense with his services, and he stated that the current session of the College and one full term's notice would expire at the same time, at the end of January.

He further contended that a month's notice, or a month's salary in lieu of notice, was not reasonable. The defendants, in their written statement, pleaded that after the expiry of the plaintiff's agreement for three years he was treated as a monthly servant, and that they were entitled to determine the plaintiff's service under them by giving him one month's notice of their intention to do so, and that having paid the plaintiff in lieu of notice Rs. 150 for one month's salary and Rs. 50 for a month's board, lodging and attendance, they were under no liability to the plaintiff. They further stated that a month's notice was the customary notice in the Armenian College and in other private schools in Calcutta and they contended that in any event a month's notice was reasonable notice. Evidence was adduced on both sides on the question as to whether there was any custom by virtue of which a month's notice could be considered sufficient notice in the case of school-masters employed in private schools.

Mr. Zorab (with him *Mr. A. K. Roy*), for the defendants, contended that after the expiry of the term of three years for which the plaintiff had been originally appointed, he ought to be considered as having remained on in the employ of the defendants as a monthly servant, who could be dismissed on a month's notice. That the evidence adduced showed that one month's notice is the customary notice for terminating the services of school-masters employed in private schools in Calcutta, and that such custom had been proved, and that in any event, a month's notice ought to be considered reasonable notice.

Mr. C. C. Ghose (with him *Mr. S. Hyam*), for the plaintiff. The employment of the plaintiff having been continued after the expiry of the agreement for

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three years, he must be treated as holding his post under a yearly employment and his service could only be terminated with the end of the current session. That the defendants had failed to prove that a month's notice is the customary notice in employments of this kind. That a month's notice cannot be considered reasonable. Reasonable notice in the case of school-masters ought to be at least one full term's notice. In the case of *Todd v. Kerrich* (1), it was held that the rule of one month's notice ought not to be applied to a governess and that it ought not to be applied to a school-master.

GREAVES J. The plaintiff in this case claims from the defendants, who are two of the managers of the Armenian College, a sum of Rs. 1,490 by way of damages under the circumstances to which I shall presently refer. On the 28th February 1912, the plaintiff was appointed as Mathematical and English Master at the Armenian College for a period of three years from the 1st of March 1912, at a salary of Rs. 150 a month with board and lodging. The agreement, which is contained in a resolution signed by three of the Governors or managers of the College on the 5th of March 1912, contains one or two other matters to which I need not refer and it concludes with these words: "The security to be paid him (that is a certain sum to be retained from his salary) when the managers dispense with his services which they are entitled to do for insubordination, insobriety, neglect of duties, etc., on one month's notice." In pursuance of that agreement, the plaintiff continued as a teacher at the Armenian College until the month of July of last year. On the 22nd of July of last year he received verbal notice to terminate his appointment, and on

the 26th of July he received a written notice to terminate his appointment as from the 1st of August. He was offered and paid one month's salary for the month of August, at the rate provided by the agreement, *i.e.* Rs. 150. He continued to occupy his quarters and received board and lodging until the 24th of August last, without performing any duties of the College and he was tendered and accepted a sum of Rs. 50 in lieu of the loss which he had sustained by losing the board and lodging during the period, one month from the 1st of August. The plaintiff accepted the sums of Rs. 150 and Rs. 50 without prejudice to such rights as he had and which he claims in this suit. The plaintiff's claim of Rs. 1,490 is set forth in detail in paragraph 16 of the plaint. His claim is for Rs. 1,690, *i.e.* Rs. 900 on account of salary in lieu of notice from the 1st of August 1916 to the end of January 1917 at the rate of Rs. 150 a month, and Rs. 790 for board and lodging, electric current and attendance from the 1st August 1916 to the end of January 1917 at the rate of Rs. 150 a month, and he gives the defendants credit for the sum of Rs. 200 received under the circumstances, which I have already stated, making his total claim for Rs. 1,490 as already stated at the commencement of this judgment. The issues which have been agreed upon between the parties, are as follows: *first*, what notice is the plaintiff entitled to; *secondly*, to what damages, if any, is he entitled?

The defendants' case shortly put is this, they say that they are not liable to the plaintiff for any sum at all, that they were entitled to give him a month's notice, as they did, and pay him a sum of Rs. 150 in respect of salary, and that the sum of Rs. 50 which they have paid him for the loss of board and lodging, compensates him for any loss which he has incurred

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in that respect, and they sought to show before me that there was a custom or usage in the profession of school-masters, both in Calcutta and in India, establishing that, apart from any definite agreement, the school-master was entitled to give and receive and the school authority was entitled to give and receive one month's notice to terminate the agreement.

The evidence that was given before me was to this effect. On behalf of the plaintiff Mr. Heramba Chandra Maitra, the Principal of the City College since 1905, stated that according to the custom of the City College and of the schools which he knew, the teacher or the governing body were entitled to terminate an engagement by giving notice to terminate it with the existing session. He said that in his own case he gave notice in April to terminate his employment and that the session ended in May and that that was good notice, and he said in cross-examination that the College must have accepted a month's notice from him and that if the College gave him notice in April to terminate in May, the notice would be sufficient as the session ended on the 31st of May. He also stated in cross-examination that he knew nothing of European schools. The plaintiff also gave evidence and, with regard to the question of the custom, he stated in cross-examination that he did not know of any custom in connection with the Armenian College that teachers should receive a month's notice, and he said "I am prepared to say that one month's notice is not given except in cases of misconduct." He also gave evidence upon the question of damages for loss of board, and he said that at the College he occupied a large room and had the use of the school dining room, the school servants, electric lights and fan, and received board and lodging and had the use of a godown for a private servant of his

own, and he estimates that he could not have got accommodation similar to this or suitable accommodation for his position under a less sum than Rs. 150, including therein all those things which I have mentioned. Then on behalf of the defendant, Mr. Joseph Samuel Zemin gave evidence. He is professor of English literature at St. Paul's College in this city, and is also a professor at the Central College in Cornwallis Street. He was previously, he stated, at the Doveton College for thirty-one years, part of the time as a junior master and part of the time as Head of the College, and he stated that while he was there the services of masters were dispensed with other than for misconduct, and that in those cases a month's notice was given and received when there was no special contract or agreement. He gave one or two specific instances. He said, "In Calcutta itself I have no personal knowledge of the length of notice that is usual in schools" and in cross-examination he said that with regard to the cases in which notice had been given that it was perfectly understood, when the persons came to the College, that one month's notice should be given to terminate their appointments. He said this was one of the terms of their employment. Then Mr. Kirkpatrick gave evidence. He spoke from 33 years' experience in the Punjab, *i.e.*, in Ludhiana, Amritsar, Delhi and Simla, and he said that so far as he was aware it was always the custom that one month's notice should be given and received. Then Mr. Moreno, the present Principal of the Armenian College, was called and he spoke from experience both of the Armenian College and as head of the C. M. S. School and as Principal of the Kidderpore Institution, and he stated that his understanding of the custom was that, in the absence of an agreement, a month's notice is usually given and accepted, and he stated that when

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he ceased to reside upon the College premises he accepted from the governors an allowance of Rs. 50 a month in lieu of board and lodging. Then we had the evidence of Mr. Galstaun, who is one of the defendants, and of Mr. David, who is the other defendant, both of them being managers of the college at the present time, and they stated that in their experience it had been the custom among the masters of the Armenian College to take and receive one month's notice to terminate their engagements, and with regard to the sum of Rs. 50 which they tendered to the plaintiff in lieu of board and lodging, they stated that they arrived at this figure upon the basis of what it would cost to obtain suitable accommodation at the Young Men's Christian Association in Corporation Street. Mr. David stated that, for full board and lodging and the use of a separate room including electric light and fan and the general use of other rooms there the charge would be Rs. 35 a month, but that of course, no profit was being made by the Society in respect of these charges. Now it seems to me that there are three possible conclusions that one can arrive at in this case. *First*, you can say that the employment of the plaintiff having been continued after the expiration of his agreement, he must be treated as holding his post upon a yearly employment which could only be terminated with the end of the session, *i. e.*, upon the 21st of December 1916, or if you take the holidays into account then on the 21st of January 1917; or, *secondly*, it is possible to say that he is entitled to a reasonable notice, *i. e.*, either three months' notice or a term's notice, the first of which would have the effect of terminating his employment at the end of October and the second on the 21st of Decemer 1916. So far as I can gather, the school year ends on the 21st December, and there are three terms in the year,—one from the

21st of January to the 15th of May, another from the 15th of June to the 1st of October, and another from the 11th of October to the 21st of December. If he was entitled to three months' notice from the 1st of August his employment would come to an end at the end of October, and if he was entitled to a term's notice then his employment would come to an end either on the 21st of December or as the plaintiff contends, on the 21st of January when the school holidays end; or, *thirdly*, there is the contention of the defendants that according to the custom, which is generally in vogue in Calcutta and in India, an employment of this kind can be terminated by a month's notice. Now, first of all, so far as the custom is concerned, I am not satisfied upon the evidence that any custom of a month's notice in an employment of this kind has been established to my satisfaction. The rule of proof of custom or usage can be stated shortly as follows:—Usage is proved by the oral evidence of persons who become cognisant of its existence by reason of their occupation in the particular trade or business and the evidence establishing custom or usage must be clear, convincing and consistent, and to prove an usage in a particular trade it must be shown that the usage is consistent and reasonable and was universally acquiesced in and that every body acknowledged it in the trade and knew of it, or might know of it if he took the pains to enquire. Now, of course, I have before me certain evidence as to the existence of this custom, but I am not satisfied that the evidence is sufficient to establish that this custom is so established as to be known to every one in the profession if he takes the pains to enquire, nor am I satisfied at all that one month's notice in the case of an employment of this kind is a reasonable notice, because as I pointed out in the course of the case the school

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terms beginning as they do, it might press very harshly upon a person employed as a teacher if he were given one month's notice. say, at the beginning of a term, as then he might have to wait two months and probably another month during the school holidays before a new term began at another school, *i.e.*, unless he were fortunate enough to get a temporary position or some other kind of employment he might well find himself without any means of support during that period if a rule of a month's notice were established. Therefore, I cannot say that in a profession of this kind this is a reasonable notice. Counsel for the plaintiff referred me to the case of *Todd v. Kerrich* (1). In that case a lady had been employed as a governess for a term of one year at a salary of £60 a year. She was given notice to terminate her engagement before her term had expired and her employer offered her a month's salary in lieu of notice. She declined to accept this and she sued for salary at the agreed rate for the balance of the year during which she had been engaged and she recovered the amount for which she sued. Against that there was an unsuccessful appeal and Chief Baron Pollock made this statement in his judgment:—"The position which the lady holds, the station which she occupies in the family, and the manner in which such a person is usually treated in society, certainly place her in a very different situation from that which mere menial and domestic servants hold. So far, therefore, as the question is to be treated as a matter of law, a governess does not fall within that rule" and I do not see why that principle should not be applicable here. Then I have got to consider the two other alternatives, *i.e.*, whether having regard to the terms of the resolution of the 5th of March 1912, the employment must be

(1) (1853) 8 Exch. 151.

deemed to have been continued as an yearly employment, which would terminate with the end of the year or of the school session. I am inclined to think that this is probably the true position in this case, and that after the plaintiff's agreement had expired he stayed on with the Armenian College on an yearly agreement terminating when the school year terminated, *i.e.*, on the 21st December or thereabouts in any year, but if I am not right in this, then I think that, apart from any provision in the agreement itself, the plaintiff is entitled to a reasonable notice, which I should put at either three months, or a term's notice. So, I think, for the purposes of this case, it will be sufficient if I take it that the plaintiff was entitled to notice up to the 21st of December whether under the agreement or as a reasonable notice. Before I come to deal with the actual sum to which the plaintiff is entitled, I think, I should say something with regard to the concluding words of his agreement. I think that the fact that one month's notice applies to a case of insubordination, insobriety, neglect of duties, etc. (the etc. of course being *ejusdem generis*) negatives the idea of one month's notice if his service is dispensed with on other grounds. I think that this is an additional reason why notice to terminate his services should terminate with the end of the session itself, or that he should receive the reasonable notice such as I have described. Therefore, I think, the plaintiff is entitled to recover from the defendants salary at the rate of Rs. 150 a month for the four months of August, September, October and November and for a further period of 21 days, *i.e.*, up to the 21st of December (I do not think he is entitled to include the school holidays from the 21st of December to the 21st of January) *i.e.*, under these two heads he will be entitled to a sum of Rs. 705 calculated at the rate of Rs. 150 a

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month. Then so far as board and lodging are concerned, I feel some difficulty in this matter and apart from the case of Mr. Moreno himself, I should have certainly thought that the plaintiff was entitled to be recompensed for the loss, which he says he suffered, at a sum greater than Rs. 50 a month, and of course, Mr. Moreno says that this was a mutual arrangement between himself and the managers. It may have been that other arrangements would have been arrived at if he had not been agreeable to the managers' proposal and had accepted the sum offered. I think a fair figure to allow is Rs. 75 a month calculated for the months of August, September, October and November and up to the 21st of December; this will roughly be Rs. 350, *i.e.*, I think, the plaintiff is entitled to recover from the defendants the sum of Rs. 750 *plus* Rs. 350 less the sum of Rs. 200 already paid, that is to say, a total sum of Rs. 855. I give judgment for that sum to be paid to the plaintiff by the defendants who do not as managers desire to dispute their liability if I am against them in the defence they raise, and the defendants must pay to the plaintiff his costs of the suit. As the suit has been brought in the High Court, I direct taxation under R. 58, Ch. XXXVI of the Rules of the Original Side of this Court.

A. K. R.

Attorneys for the plaintiff: *Kar, Mehta & Co.*Attorneys for the defendants: *Morgan & Co.*

FULL BENCH.

Before Sanderson C. J., Woodroffe, Mookerjee, Chitty and Teunon JJ.

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May 11.

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Remand—Appellate Court, power of—Inherent jurisdiction—Correction of omissions or defects in the trial—De novo trial—Civil Procedure Code (Act V of 1908), ss. 107, 151 ; O. XLI, r. 23.

The power of remand under s. 107 of the Civil Procedure Code is limited to the case described in O. XLI, rule 23, but nothing in that section restricts in any manner the application of the principle of inherent power recognised by s. 151 of the Code.

The powers of the Appellate Court as regards remand are thus not restricted to the case specified in O. XLI, r. 23, but the Court, by reason of its inherent jurisdiction, recognised and preserved in the Code, may order a remand in cases other than the case specified in O. XLI, r. 23, if it be necessary for the ends of justice.

Nabin Chandra Tripati v. Prankrishna De (1) dissented from.

Inherent jurisdiction must be exercised with care, subject to general legal principles and to the condition that the matter is not one with which the Legislature has so specifically dealt as to preclude the exercise of inherent power.

Per WOODROFFE J. Whether justice does require a Court to invoke its inherent jurisdiction, must be determined by that Court, with reference to the particular facts of the case, and the rule of law that a Court cannot invoke an inherent jurisdiction where there is a provision in the Code, whether by way of remand or otherwise, which, if applied, will meet the justice of the case.

Per MOOKERJEE J. That the Code itself recognises the power of a Court to direct a remand in circumstances other than those specified in O. XLI, r. 23 is clear from the terms of s. 99.

* Reference to Full Bench in Appeal from Original Civil No. 27 of 1916.

(1) (1913) I. L. R. 41 Calc. 108.

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The Court of Appeal is invested with plenary powers to correct errors of procedure committed by the trial Court.

Where the Court of Appeal is satisfied that the correction of the omission or defects in the trial is not reasonably practicable by recourse to one or other of the provisions mentioned, that is, where it is clearly apparent that the Appellate Court cannot itself satisfactorily dispose of the suit on the merits by the adoption of the specific procedure mentioned in O. XLI, rules 24 to 29, a remand for retrial is not only permissible but obviously incumbent on the Court.

APPEAL by Abdul Karim Abu Ahmed Khan Ghuznavi, the defendant.

The Allahabad Bank, Ltd., brought a suit against Abdul Karim Abu Ahmed Khan Ghuznavi for the recovery of Rs. 5,37,794-0-9 as principal and interest due on a promissory note endorsed in favour of the plaintiff Bank. The defendant in his written statement made various allegations of misrepresentation and fraud against the said Bank. The suit was tried by Mr. Justice Fletcher and judgment was given in favour of the plaintiff Bank for Rs. 4,63,174-13-9. Against this judgment the defendant appealed. The appeal came on for hearing before the Chief Justice and Mr. Justice Mookerjee, and their Lordships were of opinion that the case should be sent back for retrial on the ground that the alleged misrepresentation had not been fully gone into by the Original Court and gave directions accordingly. The respondent Bank, thereupon, applied to the Appeal Court for a review of its judgment upon the ground that the case could not be sent back for retrial on issues already dealt with and decided by the Original Court. At the hearing of the application, their Lordships, in view of the conflicting decisions on this point in this Court, made the following reference to Full Bench :—

“Whether the power of the Appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in O. XLI, r. 23 of the same Code, or whether, it is competent to

the Appellate Court to remand a case in which, in the opinion of the Court, there has been no proper trial.

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Mr. P. L. Buckland, for the Allahabad Bank, Ltd., the respondent. S. 107 of the Code created the powers of the Appellate Court in respect to remand. This section, though wide and comprehensive in its terms, was subject to the limitations and conditions prescribed by s. 2 (16) of the Code, which should be strictly followed. There could be no remand under s. 107, unless it was derived from the Code and was within the terms of the rules. The rules of the Code put a limitation or condition on the sections of the Code and r. 23 of O. XLI was both a condition and a limitation. As a matter of fact the word remand in s. 107 included any case sent back to the Court of first instance. Such a case must be under either r. 23 or r. 25 of O. XLI. Where there was a decision by a Court of first instance, the Appellate Court had no power to send back the whole case for retrial. The duty of the Appellate Court under the scheme of the Code was to keep seisin of those points in the case in regard to which there had been a decision and might either send back the case for fresh evidence to be taken or take such evidence itself: see O. XLI, rr. 27—29. Under s. 107 (2) the Appellate Court had all the powers of the Original Court. The granting of unlimited powers of remand to the Appellate Court would be extremely dangerous and the sending back of the whole case for retrial would lead to embarrassment. The Appellate Court in dealing with the decree must not have it in existence while ordering a retrial. It must first reverse it giving reasons for so doing. O. XLI, r. 32 and r. 31 provided for this. There was nothing provided for setting aside a judgment and regarding it a nullity without expressing

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an opinion: *Raisingji v. Balvantrao* (1) and *Habib-Ullah Khan v. Lalta Prasad* (2).

In *Zohra Bibi v. Zobida Khatun* (3), *Upendra Chandra Mandal v. Shaikh Sa'han* (4), *Gora Chand Haldar v. Basanta Kumar Haldar* (5) and *Uzir Ali Sardar v. Savai Behara* (6) the power of remand was not limited. See also *Narottam Rajaram v. Mohanlal Kahandas* (7). In three of the above cases new parties were added and though not in support of the respondent's case, those three cases were not against it. A retrial, where a new party was added, involved a retrial for the added and not the original parties and, therefore, it was not absolutely essential to invoke the inherent powers of the High Court for a remand. *Gora Chand Haldar v. Basanta Kumar Haldar* (5) was the only authority against the respondent. In support of the respondent's case *Nabin Chandra Tripathi v. Prankrishna De* (8) was relied on. *Mani Mohan Mandal v. Ramtaran Mandal* (9) was also referred to.

As regards s. 151 of the Code, that section did not extend the powers of the Court. It could not be invoked to justify an order not within the Code, unless such order was within the inherent power of the Court. S. 151 did not give the Court any power which the Court had not. It provided for cases not provided for in the Code and if reliance were placed on the Code, the power relied on must be shown to have existed as the inherent power of the Court and not to have been expressly taken away by the Code. See *Doorga Churn Doss v. Nittokally Dossee* (10),

(1) (1887) I. L. R. 11 Bom. 663.

(2) (1912) I. L. R. 34 All. 612.

(3) (1910) 12 C. L. J. 368.

(4) (1911) 11 Ind. Cas. 183.

(5) (1911) 15 C. L. J. 258.

(6) (1916) I. L. R. 43 Calc. 938.

(7) (1912) I. L. R. 37 Bom. 289.

(8) (1913) I. L. R. 41 Calc. 108.

(9) (1915) I. L. R. 43 Calc. 148.

(10) (1880) I. L. R. 5 Calc. 819.

Hukum Chand Boid v. Kamalanand Singh (1) and *Gurdeo Singh v. Chandrikah Singh* (2). The power of remand in the present case, therefore, must be limited to the provisions of the Code. If the power to go behind the rules and orders were an inherent power, then it was not under s. 107 of the Code and not within the question referred.

The Offg. Advocate-General (Mr. B. C. Mitter, with him *Mr. C. C. Ghose*), for A. K. A. A. K. Ghuznavi, the appellant (*contra*). If there was no proper trial the Appellate Court must necessarily for the ends of justice direct a new trial and send the case back to the Original Court for such a trial. The Code was very elastic and it was by no means exhaustive: see *Hukum Chand Boid v. Kamalanand Singh* (1) and also *Mani Mohan Mandal v. Ramtaran Mandal* (3). Where there has been no trial the decree was voidable and must be reversed. *Dimes v. The Proprietors of the Grand Junction Canal* (4). On principle and reason the Court must be deemed to have powers of remand irrespective of those specified in the Code and the inherent jurisdiction could be invoked, if there had been no proper trial and if for the ends of justice there must be a proper trial. S. 151 of the Code and the notes thereunder in Mulla's Civil Procedure Code were referred to on the question of the inherent powers of the Court. In support of the Appellant's contention that the Appellate Court had power to order a new trial, *Zohra Bibi v. Zobida Khatun* (5), *Upendra Chandra Mandal v. Shaikh Sabhan* (6), *Gora Chand Halder v. Basanta Kumar*

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(1) (1905) I. L. R. 33 Calc. 927; (3) (1915) I. L. R. 43 Calc. 148.

3 C. L. J. 67.

(4) (1852) 3 H. L. C. 759.

(2) (1907) 5 C. L. J. 620.

(5) (1910) 12 C. L. J. 368.

(6) (1911) 11 Ind. Cas. 183.

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Haldar (1) and *Uzir Ali Sardar v. Savai Behara* (2) were relied on. *Peari Dai Debi v. Jotindra Nath Bose* (3) was referred to. The only case against this contention was *Nabin Chandra Tripati v. Prankrishna De* (4); but there the *dictum* laid down was merely *obiter*. The power of new trial though not expressly dealt with in the Code was necessary and existed in the Appellate Court, and a similar view was taken in the other Presidencies.

Mr. Buckland, in reply. In all the cases relied on by the appellants, except one, the question of remand arose out of misjoinder of parties. The old Code was so entirely different that the cases on it were of no value. The inherent jurisdiction did not give power to Judges to deal with cases arbitrarily. See *Halsbury's Laws of England*, Vol. 23, pp. 202 and 203 on the duties of the Court of Appeals and also *Laljee Mahomed v. Guzdar* (5). The Court of Appeal, therefore, had full powers to go into this case and to hear questions of facts and should do so. It could not send back the case for decision on a point which the Court of first instance had already come to a decision upon. The word 'remand' simply meant sending a thing back. It did not connote or denote the order to be made. *Murray's English Dictionary* and *Bouvier's Law Dictionary* were referred to.

SANDERSON C. J. I think the reference may conveniently be considered in two parts. First, whether the power of the Appellate Court with regard to a remand under section 107 of the Code of Civil Procedure of 1908 is restricted to the case specified in Order XLI, rule 23, and, second, whether it is competent

(1) (1911) 15 C. L. J. 258.

(3) (1909) 10 C. L. J. 496.

(2) (1916) I. L. R. 43 Cal. 938.

(4) (1913) I. L. R. 41 Cal. 108.

(5) (1915) I. L. R. 43 Cal. 833.

to the Appellate Court to remand a case in which in the opinion of the Court there has been no proper trial.

As regards the first part: In order to ascertain the intention of the Legislature on this point, I think it is useful to examine the state of the law at the time the 1908 Code was passed.

Under the Civil Procedure Code of 1882, the section which corresponded in effect to Order XLI, rule 23, was 562. That section, however, was followed by 564 which provided that "the Appellate Court shall not remand a case for a second decision except as provided in section 562."

Section 566 of the 1882 Code corresponded to Order XLI, rule 25 of the present Code.

It had been held that though the Code of Civil Procedure of 1882 bound all Courts as far as it went, it was not exhaustive and did not affect previously existing powers, and that in matters with which it did not deal the Court would exercise inherent jurisdiction to do that justice between the parties which was warranted by the circumstances and which the necessities of the case required and that in spite of the express provision of section 564, the Appellate Court was not precluded from remanding a suit in a case to which neither section 562 nor section 566 applied.

See *Habib Bakhsh v. Baldeo Prasad* (1) and *Hukum Chand Boid v. Kamalanand Singh* (2) at page 932.

The law being as stated above with regard to the power of remand the Civil Procedure Code of 1908 was passed.

The scheme of this Code is different from that of 1882. A general power is given by section 107 which

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(1) (1901) I. L. R. 23 All. 167.

(2) (1905) I. L. R. 33 Calc. 927 ;
 3 C. L. J. 67.

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is made by its terms subject "to such conditions and limitations as may be prescribed" (which means prescribed by rules) and the provisions of sections 562 and 566 of the Old Code are in effect reproduced in Order XLI, rules 23 and 25, and section 564 has not been re-enacted either in the Code itself or in the rules.

Further, a new section applicable to this matter, viz., section 151 was introduced. This section is as follows: "Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

In my judgment, it was not the intention of the Legislature in the Code of 1908 to limit the powers of remand to the case specified in Order XLI, rule 23, but that it intended to and did recognise and preserve such powers as had been exercised theretofore.

I think it may fairly be argued that under section 107 read by itself, and having regard to the words "subject to such conditions and limitations as may be prescribed" the power of remand is limited to the case described in Order XLI, rule 23: but that does not dispose of the matter, for that section must be read together with section 151, which not only recognises but expressly preserves the inherent powers of the Court to make such orders as may be necessary for the ends of justice.

The question whether it is necessary for the ends of justice to exercise such powers of remand must depend upon the circumstances of each particular case and in exercising such jurisdiction the Court must, no doubt, be careful to see that its decision is based on general legal principles and subject to the rule that if the Code does contain specific provisions which

would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked.

In my judgment, therefore, the powers of the Appellate Court as regards remand are not restricted to the case specified in Order XLI, rule 23, but the Court, by reason of its inherent jurisdiction, recognised and preserved in the Code as above mentioned, may order a remand in cases other than the case specified in Order XLI, rule 23, if it be necessary for the ends of justice.

As regards the second part of the reference, I think on further consideration that it is couched in too general terms, and that an answer to such a general question might lead to difficulty and misapprehension and inasmuch as the answer to the first part of the reference is really sufficient to dispose of the matter, I do not think it is necessary to give a specific answer to the second part of the reference.

WOODROFFE J. The reference raises two questions *firstly*, whether the Court's power of remand under section 107 is restricted to the case specified in Order XLI, rule 23 of the Code; and *secondly* (if the answer be in the negative) whether it is competent to the Appellate Court to remand a case in which, in the opinion of that Court, there has been no proper trial. These two matters should, I think, be kept distinct. As regards the first part of the reference, the power to remand is sought to be based both on section 107 of the Code and on the inherent jurisdiction. In my opinion, section 107 cannot be relied upon as giving further powers than those which are specifically mentioned in the rules. This question of the relation between the body of the Code and the rules has been discussed in *Mani Mohan Mandal v. Ramtaran*

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Mandal (1) by Sir Lawrence Jenkins C. J. who took part in the framing of the new Code. I agree with what is there said and I need not repeat the whole of it. The body of the Code creates jurisdiction, while the rules indicate the mode in which it is to be exercised. The body of the Code must, therefore, be read in conjunction with the rules either as existing at the date of publication of the Code, or as altered or added to subsequently. A contrary view might lead to difficulties, for (to take an example) it might be urged that section 114 of the Code gave the Court power to entertain a review in cases not covered by Order XLVII, rule 1. I think, therefore, that the power of remand under section 107 is limited to the case described in Order XLI, rule 23. If this were not so, the rules would be unnecessary, for the general power of remand would cover not only Order XLI, rule 23, but every other conceivable case. But Sir Lawrence Jenkins went on to say "and this is the general rule except under special conditions which have no application in the circumstances of the case." What is it which authorises the Court to act in such cases? In my opinion we must invoke in such a case the inherent powers of the Court which are both recognised and saved by section 151 of the Code. I have dealt with this question whether the Code is exhaustive or not and whether the Court has inherent jurisdiction to pass such orders as justice requires in my judgment in *Hukum Chand Boid v. Kamalanand Singh* (2) and I, therefore, do not repeat what I have said there. Doubtless this exercise of inherent jurisdiction must be exercised with care subject to the general legal principles and to the condition that the matter is not one with which the Legislature has so

(1) (1915) I. L. R. 43 Calc. 148. (2) (1905) I. L. R. 33 Calc. 927 ;

3 C. L. J. 67.

specifically dealt as to preclude the exercise of inherent power. But it is argued here that the Court has dealt with the subject of remand and has, therefore, indicated that it is not to be ordered except in the one specific instance mentioned in Order XLI, rule 23. I am not prepared to hold this, the more so that section 564 of the previous Code has not been re-enacted. The mere fact that section 107 deals with remand does not exclude the Court's inherent jurisdiction to make orders of remand in cases other than those covered by Order XLI, r. 23. I am of opinion, therefore, that the powers of the Appellate Court as regards remand are not limited to the specific case mentioned in Order XLI, r. 23, and that the Court, under its inherent jurisdiction, may order a remand to do what is right and necessary in cases other than those covered by that order if justice so requires it. Whether justice does require a Court to invoke its inherent jurisdiction, must be determined by that Court with reference to the particular facts of the case and the rule of law that a Court cannot invoke an inherent jurisdiction where there is a provision in the Code, whether by way of remand or otherwise, which, if applied, will meet the justice of the case. The merits of the particular application out of which this reference arose are not before us.

The second part of the reference is in such wide terms that I feel a difficulty in answering it in a manner which will not lead to misapprehension. Thus the words a "proper trial" might include cases within Order XLI, and an answer in the affirmative might enable the Courts to order wrongly a new trial although the particular case ought to be dealt with under the provisions of Order XLI. It is the less necessary to do so as the Advocate-General has stated that he will be satisfied with a decision given on the first part of the reference.

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MOOKERJEE J. The question referred for decision has been framed in the following terms: "Whether the power of the Appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in Order XLI, rule 23 of the same Code, or, whether it is competent to the Appellate Court to remand a case in which, in the opinion of that Court, there has been no proper trial."

I shall confine myself to an examination of the first branch alone of the question formulated; for, if it is answered in the negative, the second does not arise, while if it is answered in the affirmative, the second need not be considered, as it is not necessary for our present purpose to specify the limits of the power of remand, if such power is capable of exercise in cases other than those contemplated by Order XLI, rule 23.

Section 107 recognises the power of an Appellate Court to remand a case, but such power is expressly made subject to such conditions and limitations as may be prescribed, that is, prescribed by rules and forms contained in the first schedule or made under section 122 or section 125 (section 2, clauses 16 and 18). This, in my opinion, does not necessarily imply that whenever there is a provision in the rules relating to the matters mentioned in the section, the provision is by way of condition or limitation; whether a particular rule has or has not this effect must clearly depend on its terms. This is not inconsistent with the view indicated by Jenkins C. J. in *Mani Mohan Mandal v. Ramtaran Mandal*(1) that the body of the Code creates jurisdiction, while the rules indicate the mode in which it is to be exercised, which it is important to observe, is essentially different from the view adopted by Stephen J. in *Nabin Chandra Tripati v. Prankrishna De* (2) that

(1) (1915) I. L. R. 43 Cal. 148. (2) (1913) I. L. R. 41 Cal. 108.

the sections lay down general principles, while the rules provide the means by which they can be applied and they cannot be otherwise applied as the rules restrict the provisions contained in the sections. I do not read Order XLI, rule 23 as a limitation on the power of remand recognised in section 107 in the sense that the power to remand can be exercised only in the contingency mentioned in Order XLI, rule 23. Apart from this, it seems to me to be incontestable that section 151, which embodies a statutory recognition of the inherent power of a Court to make such orders as may be necessary for the ends of justice, gives ample authority to the Court to make an order of remand in cases not comprised within Order XLI, rule 23, where the Court is satisfied that such order is necessary for the ends of justice. Section 151 does not recognise a new principle; it embodies a doctrine which had been enunciated by Sir Barnes Peacock in *Hurro Chunder Roy Chowdhry v. Shoorodhonee Debia* (1) and was re-stated and re-affirmed by Woodroffe J. and myself in *Panchanan Singha Roy v. Dwarka Nath Roy* (2) and *Hukum Chand Boid v. Kamalanand Singh* (3). I feel no doubt whatever that nothing in section 107 restricts in any manner the application of the principle of inherent power recognised by section 151. This was the view adopted by me, after careful consideration, and in concurrence with Carnduff J. in *Zohra Bibi v. Zobida Khatun* (4) and *Gora Chand Haldar v. Basanta Kumar Haldar* (5). I see no reason to depart from that view which has been subsequently followed in *Upendra Chandra Mandal v. Shaikh Sabhan* (6) and *Uzir Ali Sardar v. Savai Behara* (7). The decision of

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(1) (1868) 9 W. R. 402, 406.

(4) (1910) 12 C. L. J. 358.

(2) (1905) 3 C. L. J. 29.

(5) (1911) 15 C. L. J. 253.

(3) (1905) 1. L. R. 33 Calc. 927 ;

(6) (1911) 11 Ind. Cas. 183.

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(7) (1916) 1. L. R. 43 Calc. 938.

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Jenkins C. J. and N. R. Chatterjea, J. in *Mani Mohan Mandal v. Ramtaran Mandal*(1) also recognises the power of a Court of Appeal to order a remand under special conditions not included in Order XLI, rule 23. I respectfully dissent from the contrary view expressed by Stephen and Mullick JJ. in *Nabin Chandra Tripati v. Prankrishna De*(2). That the Code itself recognises the power of a Court to direct a remand in circumstances other than those specified in Order XLI, rule 23 is clear from the terms of section 99. I am fortified in my conclusion by an examination of the condition of the law as it stood under the Code of 1882. Section 564 explicitly provided that the Appellate Court shall not remand a case for a second decision except as provided in section 562; yet the Courts had repeatedly claimed a power to direct a remand in circumstances not included in section 562. The Court sometimes traced the source of this authority to its inherent power to make such orders as might be needed for the ends of justice, as in *Perumbra Nayar v. Subrahmanian Pattar*(3), but, on other occasions, the Court, apprehensive as it were to invoke its inherent power, treated the authority as involved by implication in one or other of the provisions of the Code, for instance, in *Habib Bakhsh v. Baldeo Prasad* (4). [See also *Jadab Gobinda Singh v. Anath Bandhu Saha*(5)]. While the law was in this condition, the Legislature took two significant steps, namely, *first*, they refrained to reproduce in the Code of 1908 the restrictive provision contained in section 564, and, *secondly*, they introduced in the Code of 1908, section 151, which recognises in explicit terms the inherent power of a Court to make such orders as may

(1) (1915) I. L. R. 43 Calc. 148. (3) (1899) I. L. R. 23 Mad. 445.

(2) (1913) I. L. R. 41 Calc. 108. (4) (1901) I. L. R. 23 All. 167.

(5) (1909) I. L. R. 37 Calc. 171.

be necessary for the ends of justice. The only inference legitimately deducible from this history of the legislation on the subject is that the Legislature intended to place beyond all doubt and dispute the authority of an Appellate Court to direct a remand and retrial in cases other than those comprised in Order XLI, rule 23, where the Court is satisfied that such order is necessary in the ends of justice. There is, on the other hand, the significant fact that sections 584 and 585 of the Code of 1882, which enumerated the grounds for a second appeal and prescribed a restriction that a second appeal did not lie on any other ground, reappear as sections 100 and 101 of the Code of 1908. The view that a Court of Appeal is competent to direct a remand and retrial in a case not covered by Order XLI, rule 23, if the Court is satisfied that such an order is necessary in the ends of justice, has been adopted in other High Courts under the Code of 1908: *Narottam Rajaram v. Mohanlal Kahandas* (1), *Kuppilam v. Kunjuvalli* (2), *Jambulayya v. Rajamma* (3). It is undeniable that exceptional cases, not capable of exhaustive enumeration or classification, do sometimes occur in which defects of trial are so radical as to be incurable otherwise than by a retrial *de novo*. In a case of this description, it is incumbent on the Court of Appeal to exercise its inherent power to make such orders as, in its opinion, are required in the ends of justice. The exercise of such inherent power can only be invoked where the Court is satisfied that the specific provisions of the Code are not sufficient to meet the necessities of the case. The Court of Appeal is invested with plenary powers to correct errors of procedure committed by the trial Court, as is clear from an examination of

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(1) (1912) I. L. R. 37 Bom. 289. (2) (1911) 9 Mad. L. T. 373.

(3) (1912) I. L. R. 36 Mad. 492.

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rules 24—29 contained in Order XLI of the Code. These provisions cannot be arbitrarily disregarded, on well-established principles which regulate the exercise of inherent power by a Court of Justice, as explained in the judgments in *Hukum Chand Boid v. Kamalanand Singh*(1) and *Panchanan Singha Roy v. Dwarka Nath Roy*(2); but where the Court of Appeal is satisfied that the correction of the omissions or defects in the trial is not reasonably practicable by recourse to one or other of the provisions mentioned, that is, where it is clearly apparent that the Appellate Court cannot itself satisfactorily dispose of the suit on the merits by the adoption of the specific procedure mentioned in rules 24—29, a remand for retrial is not only permissible but obviously incumbent on the Court. This view has been followed in practice in this Court for a long series of years, and this is obviously a case for the application of the maxim *cursus curiæ est lex curiæ*. In my opinion, the reference should be answered in the terms mentioned in the judgment of the learned Chief Justice.

CHITTY J. The following question has been referred for decision by the Full Bench:—"Whether the power of the Appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in Order XLI, rule 23, of the same Code, or whether it is competent to the Appellate Court to remand a case in which in the opinion of that Court there has been no proper trial." These are really two separate questions, to which it would be inconvenient, if not impossible, to give a single answer.

Dealing with the first part of the question, I confess that I was at first sight inclined to think that

(1) (1905) 1. L. R. 33 Calc. 927; (2) (1905) 3 C. L. J. 29.

3 C. L. J. 67.

Order XLI, rule 23 while prescribing a condition to a remand under section 107 (1) (b) did not impose any limitation on the power of an Appellate Court under that section. There are no words of limitation to be found in rule 23. As was said by the Court in *Zohra Bibi v. Zobida Khatun* (1), "Rule 23 makes provision for a particular contingency, but clearly in its scope is neither exclusive nor all embracing." Section 99, also, which precedes section 107 and which forbids a remand under certain circumstances, seemed to me to imply that there may be cases of remand not covered by Order XLI, rule 23. On the other hand, however, it may be reasonably urged that, if Order XLI, rule 23, merely prescribes one contingency, in which a remand may be made, and leaves the general provisions of section 107 otherwise unfettered in this respect, then rule 23 is wholly unnecessary and superfluous, and the same might also be said of the other rules which regulate the powers of an Appellate Court conferred by section 107, *viz.*, rules 24 to 29 inclusive. It is obvious that this cannot have been the intention of the Legislature which framed the present Code and rules together. It may be noted that by Order XLIII, rule 1 (u) the right of appeal is given only against an order under Order XLI, rule 23 remanding a case. This indicates that the only order of remand under section 107 (1) (b) contemplated by the Code and rules as framed is one made under Order XLI, rule 23. I had the advantage of reading the judgment of Woodroffe J., and I agree with what he has said in this connection. This was also the view expressed by Sir Lawrence Jenkins, the late C. J., in the case of *Mani Mohan Mandal v. Ramtaron Mandal* (2) and his opinion is entitled

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(1) (1910) 12 C. L. J. 368.

(2) (1913) I. L. R. 41 Calc. 108.

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to all the more weight as he was in a great measure responsible for the Code of Civil Procedure and the rules as they now stand.

It follows that the first part of the question must be answered in the affirmative, but the matter does not end there. I entirely agree that while the power of remand given to an Appellate Court by section 107 (1) (b) is restricted by Order XLI, rule 23, the inherent power of the Court which is expressly reserved to it by section 151 may be invoked to enable it to make an order of remand in circumstances which are not provided for by the Code or the rules. This power must be exercised with the greatest caution. It must not be exercised to enable the Court to pass an order contrary to the provisions of the Code or the Rules. Nor can it properly be exercised in circumstances where the Code or rules provide an adequate remedy, as for example, in the case of *Mani Mohan Mandal v. Ramtaran Mandal* (1) above cited, which was a case of adducing additional evidence. A good example of a case, to meet which there is no provision in the Code or rules, is *Zohra Bibi v. Zobida Khatun* (2), also above cited, which is the earliest of the cases now under review. Sir Lawrence Jenkins no doubt had this in mind when he said, "these rules provide that in the case of a lower Appellate Court the power of reversal and remand is limited to the position described in rule 23, Order XLI. And this is the general rule except under special conditions which have no application in the circumstances of this case." In this view of the matter, the prohibition of remands contained in section 99 also becomes intelligible.

I do not think that the second part of the question can be properly answered by this Full Bench. The

(1) (1913) I. L. R. 41 Calc. 108. (2) (1910) 12 C. L. J. 368.

expression "case in which in the opinion of the Appellate Court there has been no proper trial" opens up questions of fact, into which this Bench cannot go. It is, however, unnecessary to discuss the matter further as the learned Advocate-General stated that he would be content with an answer to the first question.

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TEUNON J. This reference arises out of an application for review of the judgment delivered in Appeal No. 27 of 1916, and the question referred to the Full Bench has been stated in the following terms: namely, whether the power of the Appellate Court with regard to a remand under section 107 of the Code of Civil Procedure is restricted to the case specified in Order XLI, rule 23 of the same Code, or whether it is competent to the Appellate Court to remand a case in which, in the opinion of that Court, there has been no proper trial.

Section 107, sub-section (1) of the Code provides that subject to such limitations and conditions as may be prescribed an Appellate Court shall have power—

- (a) to determine a case finally,
- (b) to remand a case,
- (c) to frame issues and refer them for trial,
- (d) to take additional evidence or to require such evidence to be taken.

For the purposes of this reference sub-section (2) may be disregarded.

The limitations and conditions prescribed are to be found in the rules contained in the first Schedule to the Code, that is, in the rules contained in Order XLI.

It is now well settled that as regards matters specifically dealt with by the Code, the provisions of the Code are exhaustive. It would seem to follow that when an Appellate Court finds itself unable to arrive

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at a final determination, it should deal with the case under one or other of the sub-clauses (b), (c) and (d), in accordance with the circumstances set out in the appropriate rule. A case should, therefore, be remanded, in other words a *de novo* trial should be directed, only where Order XLI, rule 23, is applicable, that is to say, where the trial Court has disposed of the suit upon a preliminary point.

In the course of the argument before us some stress was laid upon the omission from the present Code of the express prohibition of a *de novo* trial in other cases which was to be found in section 564 of the Code of 1882. To this omission I am unable to attach any great importance as in the view I take the provisions of section 564 of the last Code have been in effect incorporated in the wider language used in the opening clause of section 107(I), that is to say, in the words "subject to such limitations and conditions as may be prescribed."

I have set out above my view as to the general rule.

But section 107 contemplates and proceeds on the assumption that there has been in the first Court a fair and honestly conducted trial. But other exceptional cases may be conceived. It may be found that the trial Judge was disqualified by personal interest, or that owing to the attitude assumed by the Judge, either party has been precluded from putting forward his case. In such cases and in other cases, where for instance a minor has been improperly treated as a major, in all such cases (and I attempt no exhaustive enumeration of such special conditions) where it may be said that in effect there has been no trial, it is necessarily open to the Appellate Court, in the exercise of the inherent jurisdiction, for which section 151 of the Code now makes express provision, to direct a remand or a retrial.

Of the six cases decided by this Court that have been cited in the order of reference and discussed in the argument before us, three, namely, *Zohra Bibi v. Zobida Khatun* (1), *Upendra Chandra Mandal v. Shaikh Subhan* (2), *Uzir Ali Sardar v. Savai B. hara* (3), it may be observed are cases where, after adding parties, the Appellate Court directed a *de novo* trial. A remand in such cases may perhaps be supported under the provision of Order XLI, rule 23, the trial having been vitiated by the first Court's erroneous decision on the preliminary question of non-joinder and by the absence of the assistance which the added party was in a position to give. Otherwise the decision is justified under section 151 of the Code. These three cases, *Gora Chand Haldar v. Basanta Kumar Haldar* (4), and the observations of Jenkins C.J., in *Mani Mohan Mandal v. Ramtaran Mandal* (5), support in my opinion, the view I take. The remaining case *Nabin Chandra Tripathi v. Prankrishna De* (6) may possibly be said to be against it, but it is doubtful whether in that case the learned Judges had in view the exceptional circumstances which may make recourse to section 151 necessary.

For the above reasons, subject to the foregoing observations, my answer to both branches of the question referred to us is in the affirmative.

O. M.

(1)-(1910) 12 C. L. J. 368.

(2) (1911) 11 Ind. Cas. 183.

(3) (1916) I. L. R. 43 Calc. 938.

(4) (1911) 15 C. L. J. 258.

(5) (1915) I. L. R. 43 Calc. 148.

(6) (1913) I. L. R. 41 Calc. 108.

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CIVIL RULE.

Before D. Chatterjee and Newbould JJ.

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v.

ABDUL BARIK.*

Small Cause Court Suit—Dismissal for default—Application for restoration of suit—Review—Civil Procedure Code (Act V of 1908) O. IX, rr. 4, 9 ; O. XLVII, r. 1—Provincial Small Cause Courts Act (IX of 1887), s. 17.

Where a Small Cause Court suit is dismissed for the plaintiff's default in the presence of the defendant, and an application made under O. IX, rr. 4 and 9 for the restoration of that suit is also dismissed for the plaintiff's default in the presence of the defendant's pleader, and where again an application is made under O. IX, r. 9 for the rehearing of the case and another application for treating it as an application for review :—

Held, that an application under O. IX, r. 9 lay. O. XLVII, r. 1 applied to all orders of the Court which may be reviewed under certain circumstances.

Held, further, that the provisions of s. 17 of the Provincial Small Cause Courts Act did not apply to miscellaneous applications.

Deljan Nichha Bibee v. Hemant Kumar Ray (1) followed.

RULE obtained by Bipin Behari Shaha, the plaintiff.

The petitioner, Bipin Behari Shaha, brought a suit in the Small Cause Court for the recovery of a sum of money against Abdul Barik and others. Some of the defendants entered appearance, while others did not. On the 28th August 1915, the suit was dismissed for the plaintiff's default in the presence of the defendant.

* Civil Rule No. 166 of 1916, against the order of S. C. Ghose, Munsif of Dacca, dated Jan. 15, 1916.

Thereafter the plaintiff applied under O. IX, rr. 4 and 9, for setting aside the order of dismissal. On the 20th November 1915, this application was also dismissed for the plaintiff's default and in the presence of the defendant's pleader. The plaintiff next made another application under O. IX, r. 9 for the rehearing of his application for the restoration of the suit. It appears that subsequently the plaintiff made another application for treating the above application as an application for review under O. XLVII, r. 1. The learned Munsif rejected both the applications on the ground that they did not lie. From this order the plaintiff moved the High Court.

Babu Jitendra Nath Roy, for the petitioner, submitted that an application for the restoration of a suit lay under O. IX, r. 9 if it was dismissed for default of the plaintiff only. The procedure under s. 141 of the Civil Procedure Code, 1908, was applicable to all miscellaneous proceedings. Hence an application for the revival of an application for the restoration of the suit lay under O. IX, r. 9: *Sifdar Ali v. Kishun Lal* (1), *Thakur Prasad v. Fakirullah* (2). He also submitted that he was entitled to apply for review for any sufficient reason, and it could not be limited to fraud only: *Raj Narain Purkait v. Ananga Mohan Bhandari* (3), *Lall Chet Narain v. Rampal Manjhi* (4). The Court ought to have looked into the substance rather than to the form of the application which is the principle enunciated in *Ramu Rai v. Dayal Singh* (5).

Babu Manmatha Nath Roy, for the opposite party, contended that the application under O. IX, r. 9 did not lie because s. 141 did not make the procedure

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(1) (1910) 12 C. L. J. 6.

(3) (1899) I. L. R. 26 Calc. 598.

(2) (1894) I. L. R. 17 All. 106.

(4) (1911) 16 C. W. N. 643.

(5) (1894) I. L. R. 16 All. 390.

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for suits applicable to all proceeding: see *Thakur Prasad v. Fakirullah* (1), *Hari Charan Ghose v. Manmatha Nath Sen* (2). This being a Small Cause Court suit, the application for review of judgment could not lie as there was no deposit or security required by s. 17 of the Provincial Small Cause Courts Act: *Jogir Ahir v. Bishen Dayal Singh* (3). The principle enunciated in *Raj Narain Purkait v. Ananga Mohan Bhandari* (4) and *Lall Chet Narain v. Rumpal Manjhi* (5) was that an application for review of judgment should be allowed only when a partial decree had been passed on the admission of the defendant.

Babu Jitendra Nath Roy was not called upon to reply.

D. CHATTERJEE AND NEWBOULD JJ. The plaintiff brought a suit in the Small Cause Court. The suit was dismissed for the plaintiff's default in the presence of the defendant. The plaintiff then made an application under Order IX, rules 4 and 9 for restoration and rehearing of the case. On this occasion also, there was a default and then the order dismissing this case was made in the presence of the defendant's pleader. There was again an application made under Order IX, rule 9 for the rehearing of the case. The learned Munsif held that Order IX, rule 9 did not apply and, therefore, dismissed the application.

It appears that the plaintiff made an application also for treating it as an application for review. On that application also, the learned Judge said "Such application does not lie." We are unable to see the justification of such orders.

(1) (1894) I. L. R. 17 All. 106.

(3) (1890) I. L. R. 18 Calc. 83.

(2) (1913) I. L. R. 41 Calc. 1.

(4) (1899) I. L. R. 26 Calc. 598.

(5) (1911) 16 C. W. N. 643.

In the first place, we do not think that Order IX, rule 9 does not apply; and in arriving at this conclusion, we follow the case of *Deljun Nichha Bibee v. Hemant Kumar Ray* (1). There it was held that Order IX, rule 9 was applicable to a case in which an application for setting aside a sale had been dismissed. The application for setting aside the sale was treated there as an original proceeding. In this case also, in a similar way, the application for the restoration of the case under Order IX, rules 4 and 9 may be treated as an original application although no fresh parties are interested in the case. The proceeding is initiated by an application which has to be numbered as a separate miscellaneous case and decided upon evidence.

In this view of the case, we think that the learned Munsif ought to have considered the application on the merits.

Then as regards the alternative prayer for treating the application as an application for review, we do not understand why the learned Munsif says that Order XLVII, rule I, has no application. That rule seems to apply to all orders of the Court which may be reviewed under certain circumstances.

The objection taken by the opposite party was that there was no deposit under section 17 of the Small Cause Courts Act. Section 17 of the Small Cause Courts Act, however, speaks of deposits where there has been an application for review of judgment in cases where an *ex parte* decree has been passed, or a review of judgment evidently in cases where there has been a judgment deciding the case. We do not think that the provisions of section 17 with regard to deposit of security have any application to a miscellaneous application of this kind. If they had any application,

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the learned Judge might have asked the petitioner to give security or to deposit the amount instead of saying that the application does not lie.

In this view of the case, we make the Rule absolute and direct that the application should be decided on the merits.

We make no order as to costs.

L.R.

Rule absolute.

CIVIL RULE.

Before Mookerjee and Cuming JJ.

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Decree—Appeal—Dismissal for default—Merger—Civil Procedure Code (Act V of 1908), s. 2 (2) ; O. XXI, r. 22—Omission to give notice under O. XXI, r. 22, effect of—Bengal Tenancy Act (VIII of 1885) s. 155 (3)—Extension of time under s. 155 (3).

The original decree is merged in the appellate decree whether the latter confirms, amends, or reverses the original decree, and it is the appellate decree alone which can be executed.

Abdul Rahiman v. Maidin Saiba (1), *Chandrakant v. Lakshman* (2) referred to.

But this doctrine cannot be applied where the appeal is dismissed for default. In such a case the appeal fails for non-prosecution, and it cannot be said that the Court of Appeal adopts the decree of the Primary Court. The judgment of the lower Court therefore, is the judgment to be enforced.

Bipro Das v. Chunder Seekur (3) referred to.

Section 2 (2) of the Code of Civil Procedure, 1908, expressly provides that any order of dismissal for default is not a decree.

* Civil Rule No. 493 of 1916, against the Order of Diwijendra Nath Pal, Munsif of Baruipore, dated April 18, 1916.

(1) (1893) I. L. R. 22 Bom. 500, 506. (2) (1916) 24 C. L. J. 517.

(3) (1867) 7 W. R. 521.

The notice prescribed by section 248 of the Code of Civil Procedure now replaced by Order XXI, rule 12, is necessary in order that the Court may obtain jurisdiction to proceed against the property of the judgment-debtor by way of execution. The omission to give notice, as required by the rule, is not a mere irregularity which makes the proceedings voidable but is a defect which goes to the very root of the proceedings and renders it void for want of jurisdiction.

Gopal Chunder v. Gunzmani Dasi (1), *Sahdeo Pandey v. Ghasiram* (2) *Parashram v. Balmukund* (3) referred to.

Section 155 of the Bengal Tenancy Act enables the Court to give the tenant relief on the footing that there shall be no forfeiture at all when relief is granted ; the forfeiture is stopped *in limine*, so that there is no question of any destruction of an interest which has to be called into existence again.

It is competent to the Court to entertain an application for extension of the period fixed by the decree for the performance thereof under section 155 (3) of the Bengal Tenancy Act. Whether an order for extension of time should be made or not depends upon the circumstances of the litigation, *i.e.*, upon the circumstances disclosed at the original trial and the events subsequent.

Sinnaman v. Sham Charan (4) referred to.

CIVIL RULE.

The facts are shortly these. The opposite parties are the petitioners' present landlords. From their predecessors-in-interest the petitioner took about 40 bighas of jungle land, cleared and levelled the same and made it culturable and in a portion thereof excavated a pond for drinking water and by the earth dug out of the pond raised the height of a certain other portion whereon he erected his dwelling house and where also stood his cowshed, granary, stocking yard and threshing floor. About 8 or 10 years after the taking of the aforesaid land, the petitioner took another lot of 34 bighas of land and made it culturable. When the petitioner took the land it was of no value whatever, but by spending money and labour

(1) (1892) I. L. R. 20 Calc. 370

(3) (1908) I. L. R. 32 Bom. 572.

(2) (1893) I. L. R. 21 Calc. 19.

(4) (1912, 16 C. W. N. 1090 ;

16 C. L. J. 520.

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he considerably improved it which is now worth not less than Rs. 1,000 and which is the sole means of petitioners' livelihood.

A *khal* runs through the 34 bighas of the petitioners' land, but the said *khal* having silted up for non-clearance or re-excavation the petitioner suffered every year great loss for want of water for purposes of irrigation of that plot. To remove the aforesaid difficulty for irrigation the petitioner, about 12 years ago, raised *dams* in a portion of the said *khal* by digging the earth out of the intervening portion thereof, but keeping the draining perfectly as before. By so lowering a portion of the bed of the *khal* and protecting the same by *dams* the petitioner only made a reservoir of water for irrigation of the said plot of 34 bighas and a provision against the insufficiency of rain and water. By reason of the excavation aforesaid disputes arose between the petitioner and the opposite parties with the result that a suit for ejectment was brought against the petitioner. The suit was in respect of the two holdings. The Trial Court held that the first pond was an improvement and in respect thereof the suit was barred, but in respect of the other he decreed the suit and ordered ejectment in the alternative from the two holdings.

The petitioner preferred an appeal against the decree of ejectment to the District Judge.

During the pendency of the appeal, the opposite party brought a suit for rent in respect of the same lands and for period subsequent to the alleged misuse and also subsequent to the decree for ejectment.

The petitioner, thereupon, took a further ground in the said appeal, that the events subsequent to the decree rendered the suit untenable and that for that ground as for others the suit should fail.

The District Judge did not take up the appeal on

the date fixed, but on another date when the petitioner's vakil could not attend. The petitioner applied for time and prayed for an hour's adjournment, but the Judge refused the application and dismissed the appeal. Subsequently the petitioner made an application for the restoration of the appeal, but the Judge summarily rejected the same. Against the order rejecting the restoration of the said appeal, the petitioner preferred a miscellaneous appeal to this Court where the appeal is now pending.

In the meantime the opposite party, without notice to the petitioner, put the ejectment decree in execution in Baruipore Munsifi and took symbolical possession of the entire lands.

Immediately after the said symbolical possession and before the final order was passed, the petitioner made an application to the said Court for reviewing, rescinding, recalling the order for delivery of possession on the ground that by the suit for rent for the subsequent period, passed thereon and the realisation of the decretal money from the petitioner, the aforesaid decree for ejectment had been waived and discharged, or at any rate, the same had become incapable of execution. The Munsif rejected the application for review and confirmed the previous order for delivery of possession.

The petitioner then moved the High Court and obtained this Rule.

Babu Sarada Charan Maiti, for the petitioner.

Babu Manmatha Nath Roy, for the opposite party.

Cur. adv. vult.

MOOKERJEE AND CUMING JJ. We are invited in this Rule to examine the legality of an order made in proceedings in execution of a decree in a suit for

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ejection of a tenant on the ground of forfeiture for misuse of the lands of his tenancy.

The petitioner was an occupancy ryot under the opposite party and was consequently liable under section 25 of the Bengal Tenancy Act to be ejected by his landlords from his holding in execution of a decree for ejection passed on the ground that he had used the land comprised in his holding in a manner which rendered it unfit for the purposes of the tenancy. In 1912, the landlords instituted a suit against him under section 155 (1) (a) of the Bengal Tenancy Act to eject him on the ground that he had excavated a tank on his holding which rendered it unfit for the purposes of the tenancy. The suit was decreed by the trial Court on the 6th November, 1914, in the following terms: "the defendant do fill up the tank by the end of the present Bengali year 1321 (*i.e.*, 13th April, 1915) or, in the alternative, do pay Rs. 125 to the plaintiffs as compensation within that time; if he fails to carry out either of the two alternative directions within the time fixed, he will be ejected from the entire holding by executing the decree." The petitioner, who was defendant in that suit, appealed against this decree. During the pendency of the appeal, the landlords instituted a suit against him on the 17th March, 1915, to recover from him arrears of rent due from the beginning of the Bengali year 1318 (*i.e.*, 14th April, 1911), to the end of *Paus* 1321 (*i.e.*, 14th January, 1915). The claim was decreed in full on the 15th January, 1916. The appeal against the decree in the suit for ejection was then taken up for disposal on the 13th March, 1916, and was dismissed for default. An application was made for restoration of the appeal, but was summarily rejected. An appeal was thereupon lodged in this Court against the order of refusal to revive the appeal before the District Judge; that appeal is still

pending here. Meanwhile, on the 24th March, 1916, the landlords applied to the Trial Court to execute the decree of the 6th November, 1914, by ejectment of the defendant. No notice was served upon the defendant, the writ was issued forthwith, and two days later, what is called symbolical delivery of possession was given to the landlords. The tenants, thus apprised of what had taken place, applied to the Trial Court on the 1st April, 1916, and prayed that the *ex parte* proceedings for delivery of possession should be cancelled. His contention was twofold, namely, *first*, that the decree of the 6th November, 1914, had become incapable of execution as the landlords had waived the forfeiture by the subsequent institution of the suit for rent; and, *secondly*, that the Court should, in the exercise of its judicial discretion, make an order for extension of time for the performance of the decree under section 155(3). The Court overruled these contentions on the 18th April 1916. The present Rule was thereupon issued by this Court on the 19th June, under section 115 of the Civil Procedure Code and section 107 of the Government of India Act, 1915.

Before we deal with the questions in controversy, we may observe that when the landlords applied for execution on the 24th March 1916, the application was correctly described as one for execution of the decree of the 6th November 1914, because on that date the only decree capable of execution was that decree. There is really no foundation for the suggestion, somewhat plausibly made in this Court on behalf of the decree-holders, that by reason of the dismissal of the appeal to the District Judge on the 13th March 1916, the decree of the Trial Court had been merged in the decree of the Appellate Court and had been superseded thereby. It is indisputable that the original decree is merged in the appellate decree whether the latter

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confirms, amends, or reverses the original decree, and it is the appellate decree alone which can be executed: see the authorities collected in *Abdul Rahiman v. Maidin Saiba* (1) and *Chandrakant v. Lakshman* (2). But this doctrine cannot be applied where the appeal is dismissed for default; in such a case, the appeal fails for non-prosecution and it cannot appropriately be said that the Court of Appeal adopts the decree of the primary Court. This was recognised by Sir Barnes Peacock C.J. when in his judgment in the Full Bench case of *Bipro Das v. Chunder Seekur* (3) he observed that if in the case of an appeal, a new judgment of affirmance of the former decree should be given, then a new judgment would have to be executed, but if the appeal were dismissed for default, there would be no new judgment, and the judgment of the lower Court would be the judgment to be enforced. This view was adopted by a Full Bench of the Madras High Court in *Vira Samy Mudali v. Manommany Ammal* (4) and has now been accepted by the Legislature in the definition of the term "decree" in section 2 (2) of the Civil Procedure Code of 1908, which expressly provides that any order of dismissal for default is not a decree. We are not now concerned with the question of the period of limitation applicable to an application for execution of an original decree when an appeal against such decree has been dismissed for default; the answer to that question will depend upon the true construction of Article 182 (2) of the second schedule to the Indian Limitation Act, 1908, which, it may be incidentally observed, introduces at least one important variation from the corresponding provisions of the previous statutes of limitation. In our opinion, it is fairly clear that when an appeal against an original

(1) (1896) I. L. R. 22 Bom. 500, 506. (3) (1867) 7 W. R. 521.

(2) (1916) 24 C. L. J. 517

(4) (1868) 4 Mad. H. C. R. 32, 39.

decree has been dismissed for default, the order of dismissal is not a decree, that there is consequently neither in form nor in substance an appellate decree wherein the original decree may be deemed to become merged, and that the original decree is thus the decree to be executed, notwithstanding the dismissal of the appeal for default. What, then, is the inevitable consequence of the application of this principle to the case before us? The decree, which was sought to be executed by the application of the 24th March, 1916, was the decree of the 6th November 1914. As more than one year had elapsed from the date of the decree, it was incumbent upon the Court to issue a notice to the judgment-debtor under rule 22 (1) (a) of Order XXI of the Code. This was not done, and the reason why the decree-holders did not move the Court to issue the requisite notice is transparent; their intention, no doubt, was to take possession in execution as expeditiously as possible, without opportunity afforded to the judgment-debtor to raise any objection. The delivery of possession was effected, as we have seen, on the second day after the issue of the writ. Such execution, in contravention of the express provisions of the Statute, cannot possibly prejudice the position of the judgment-debtor or embarrass the Court in the determination of the merits of the controversy between the parties. It was pointed out by the Judicial Committee in *Raghunath Das v. Sundar Das Khetri* (1) that the notice prescribed by section 248 of the Code of 1882 (now replaced by Order XXI, rule 22) is necessary in order that the Court should obtain jurisdiction to proceed against the property of the judgment-debtor by way of execution. The omission to give notice, as required by the rule, is not a mere irregularity which makes the proceeding voidable, but is a defect which

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(1) (1914) I. L. R. 42 Calc. 72 ; L. R. 41 I. A. 251.

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goes to the root of the proceeding and renders it void for want of jurisdiction: *Gopal Chunder v. Gunamani Dasi* (1), *Sahdeo Pandey v. Ghasiram* (2), *Parashram v. Balmukund* (3). From the point of view that the notice is requisite as the very foundation of the jurisdiction of the Court, it is plain that the proceedings must be treated as inoperative even though a stranger may have acquired title in course thereof; but the position is obviously worse where the decree-holders themselves profess to acquire title on the basis of proceedings initiated by them and carried on in defiance of statutory requirements. We may add that, as explained in the cases of *Sudevi Devi v. Sovaram* (4), and *Bechu v. Bicharam* (5), even where section 248 of the Code of 1882 or Order XXI, rule 22 of the Code of 1908 does not apply, the Court should issue a notice on the judgment-debtor and hear his objection, if any, before it grants execution of a conditional decree on the *ex parte* statement of the decree-holder that the contingency contemplated has happened. We are consequently of opinion that the delivery of possession which is said to have taken place on the 26th March, 1916, cannot hamper us in the least degree and that we should deal with the case as if that delivery of possession had never taken place. We are further of opinion that the Court below also should have considered the matter from this point of view. As explained in *Tikait Ajant Singh v. F. T. Christien* (6), when an *ex parte* order has been made to the prejudice of a litigant who has not been afforded an opportunity to be heard—an opportunity which in this case he was entitled to have, under express statutory provisions—the order must

(1) (1892) I. L. R. 20 Cal. 370.

(4) (1906) 10 C. W. N. 306.

(2) (1893) I. L. R. 21 Cal. 19.

(5) (1909) 10 C. L. J. 91.

(3) (1908) I. L. R. 32 Bom. 572.

(6) (1912) 17 C. W. N. 872.

be regarded as subject to the implication that it may be revoked at the instance of the party affected thereby; and the Court has inherent power to give such directions as the justice of the case may require. We shall now proceed to examine the two grounds urged by the judgment-debtor in the Court below and reiterated here.

The first contention of the judgment-debtor is to the effect that the institution of the suit for rent by the landlords has rendered the decree for ejectment, previously obtained, incapable of execution; the argument in substance is that the forfeiture has been waived. It is clear that an objection of this character may properly be taken in proceedings in execution of the decree; the judgment-debtor, when he takes such objection, does not attack the decree; he merely urges that the decree, though properly made, has, by reason of events subsequent, become incapable of execution. Thus, it was ruled in *Nubo Kishen v. Hurish Chunder* (1), that receipt of rent subsequent to a decree for ejectment under section 78 of the Bengal Rent Act, 1859 from a tenant against whom the decree was passed, renders execution of the decree impossible. Similarly, it was ruled by the Judicial Committee in *Forbes v. Maharaj Bahadur Singh* (2), that a decree for ejectment made against a tenant at the instance of his landlord under section 66 (1) of the Bengal Tenancy Act, cannot be executed, if the decree-holder ceases to be the landlord after he has obtained the decree. We must, consequently, consider the effect of the institution of the suit for rent on the decree for ejectment. The judgment-debtor argues that the suit for ejectment was instituted and could have been instituted, only, on the hypothesis that his tenancy had been forfeited by misuse of the lands,

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• (1) (1867) 7 W. R. 142.

(2) (1914) I. L. R. 41 Calc. 926

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that the institution of the suit was the final election by the landlords to avail themselves of the forfeiture which had thus taken place, and that the institution of the suit for rent for a period subsequent to the date of commencement of the suit for ejectment accordingly operated as a waiver by the landlords of the forfeiture. To test the correctness of this argument, three propositions may be premised, namely, *first*, that a suit for ejectment of a tenant on the ground of forfeiture is instituted on the theory that the forfeiture has taken place prior to the commencement of the action, in other words, that the landlord has, when he comes into Court, a subsisting cause of action by reason of the unlawful possession of the tenant notwithstanding the determination of his tenancy: *Greenfield v. Hanson* (1), *Wilson v. Rosenthal* (2), *Nundan Pershad v. Meghu Mahton* (3); *secondly*, that as it is at the option of the landlord whether he will take advantage of the forfeiture or not, he may indicate his election by the institution of a suit for ejectment: *Serjeant v. Nash, Field & Co.* (4), *Grimwood v. Moss* (5), *Jones v. Carter* (6), *Kitkenney Gas Co. v. Somerville* (7); and, *thirdly*, that the forfeiture is waived by the institution of a suit for, or by the mere receipt of, rent which has accrued due since the cause of forfeiture: *Dendy v. Nicholl* (8), *Penton v. Barnett* (9), *Raj Mohan v. Moti Lal* (10). But there is also authority for the position that the receipt of rent, after an ejectment brought on a forfeiture, is no waiver of such forfeiture: *Doe v. Meux* (11), *Toleman v. Poribury* (12).

(1) (1893) 2 T. L. R. 876.

(7) (1878) L. R. 2 Ir. 192.

(2) (1906) 22 T. L. R. 233.

(8) (1858) 4 C. B. N. S. 376.

(3) (1906) 11 C. W. N. 225.

* (9) [1898] 1 Q. B. 276.

(4) [1903] 2 K. B. 304. ‡

(10) (1915) 22 C. L. J. 546.

(5) (1872) L. R. 7 C. P. 260.

(11) (1824) 1 C. & P. 346;

(6) (1846) 15 M. & W. 718.

(1825) 2 B. & C. 606.

(12) (1871) L. R. 6 Q. B. 245.

These propositions are of no assistance to the tenant in the case before us. Assume that there was a forfeiture of the tenancy by reason of misuse of the land, that the landlords elected to avail themselves of the forfeiture, and that they instituted the suit for ejectment on this basis. Do these premises necessarily show that they waived the forfeiture when they instituted the suit for rent which had accrued due since the commencement of the suit for ejectment? There might have been no escape from an inference that there had been such waiver, if there had been no provision for relief against forfeiture. The true question in controversy is, how is the status of the tenant affected by the provision for relief against forfeiture embodied in section 155. There are three alternative views possible, namely, *first*, that the tenancy continues in operation till the failure of the tenant to comply with the decree made under section 155 within the time prescribed thereby; *secondly*, that the tenancy remains in abeyance, and terminates with retrospective effect if the decree is not carried out, but revives with intermediate operation if the tenant fulfils the conditions imposed by the decree; *thirdly*, that the tenancy finally terminates on the indication of election by the landlord by the institution of the suit for ejectment, but a new tenancy is created if the decree is obeyed. We are of opinion that the second and third alternatives must be rejected—the former on the ground that a right cannot ordinarily remain in a state of suspense or abeyance, the latter on the ground that the creation of a new tenancy cannot appropriately be deemed a “relief” against forfeiture. The first alternative is, we think, free from objection, and this was the view recently adopted by the Court of Appeal in England in *Dendy v. Evans* (1), which

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affirmed the decision of Darling J. in *Dendy v. Evans* (1). In that case, a lease of premises contained a covenant by the lessee to keep the premises in repair, and there was a proviso for re-entry upon breach of any covenant in the lease. The lessee sublet the premises to the defendant. The under-lease contained a covenant to repair similar to that in the head lease and a similar proviso for re-entry. The premises went out of repair and the lessor issued a writ against the lessee to recover possession thereof. The lessee thereupon assigned to the plaintiff the term granted by the lease and the benefit of the arrears of rent. The plaintiff applied for and obtained an order under section 14 (2) of the Conveyancing Act, 1881, that all further proceedings in the action should be stayed and that the plaintiff should have relief from the forfeiture and should hold the premises according to the old lease without any new lease. The plaintiff then brought an action against the defendant to recover rent due upon the under-lease, subsequent to the issue and service of the writ by the lessor to recover possession of the premises. The question arose, whether the issue and service of the writ by the lessor, which clearly operated as a final election by him to determine the lease, had extinguished the title of the plaintiff. Darling J. ruled that the *effect of the subsequent order for relief was to restore the lease as if it had never become forfeited*, with the result that the under-lease also remained in existence and the plaintiff was entitled to recover the amount claimed. The true position then is that the word "relief" carries with it the meaning that the forfeiture is deemed not to have taken place at all, in other words, as soon as the relief is granted, the

(1) [1909] 2 K. B. 894.

forfeiture disappears just as if there never had been any forfeiture at all. The history of the development of this principle indicates that the question is by no means free from difficulty. Before the Landlord and Tenant Act, 1730, when a Court of Equity gave relief from forfeiture for non-payment of rent, it was done in some instances by grant of an injunction to restrain further proceeding at law so that the old lease continued, and in other cases, by a direction on the landlord to grant a new lease, as explained by Wigram V.C. in *Bowser v. Colby* (1); see also the judgment of Day J. in *Hare v. Elms* (2). The statute just mentioned provided that in all such cases the lessee should hold the demised lands according to the lease made without any new lease. This was re-enacted in 1852 in section 212 of the Common Law Procedure Act, which has now been replaced by section 14 (2) of the Conveyancing Act, 1881; with reference to this statute, which is closely analogous to section 155 of the Bengal Tenancy Act, the decision in *Dendy v. Evans* (3), was given. Cozens-Hardy M. R. refused to listen to the suggestion that the effect of the grant of relief against forfeiture was merely to resuscitate the lease or to grant a new lease from the date of the order: it was the original lease, he observed, which continued for all purposes, not a new lease. Farwell L. J. relied upon the definition of the term "relief" given by Lord Davey in *Nind v. Nineteenth Century Building Society* (4); "the words 'relief' and 'relieve' are the appropriate terms to describe the remedial action of the Court of Equity in cases where a penalty of forfeiture had been incurred, which the Court thinks it equitable that the complainant should not

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(1) (1841) 1 Hare 109, 126.

(2) [1893] 1 Q. B. 604.

(3) [1910] 1 K. B. 263.

(4) [1894] 2 Q. B. 226.

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lie under or suffer." Reliance was also placed by way of analogy upon the well-known principle applied to mortgage cases, as enunciated by Lord Hatherly in *Thompson v. Hudson* (1): "Equity regards the security that has been given as a mere pledge for the debt, and it will not allow a forfeiture of the property pledged on the ground that equity regards the contemplated forfeiture, which might take place at law with reference to the estate, as in the nature of a penal provision, against which equity will relieve when the object in view, namely, the securing of the debt, is attained." It is thus apparent that section 155 of the Bengal Tenancy Act enables the Court to give the tenant relief on the footing that there shall be no forfeiture at all; when relief is granted, the forfeiture is stopped *in limine*, so that there is no question of any destruction of an interest which has to be called into existence again. The tenant consequently continued in the case before us as a tenant at least up to the 13th April 1915, the date fixed in the decree for performance of the obligation imposed on him thereby. There could thus be no waiver of a forfeiture by the institution, on the 17th March 1915, of a suit for rent for the period between the 14th April, 1911, and the 14th January, 1915. The decree for ejectment did not consequently cease to be enforceable by reason of events subsequent.

The second contention of the judgment debtor is to the effect that this is a fit case for extension of the period fixed by the decree for the performance thereof under section 155 (3). The decree-holders contend that an application for extension of time cannot be entertained if made after the expiry of the prescribed period. There is no force in this contention; it appears from the decision in *Sinnuman v. Sham*

(1) (1869) L. R. 4 H. L. 1, 15.

Charan (1, that it is competent to the Court to entertain an application for enlargement of time after expiry of the period prescribed in the decree and even after the decree-holder has applied for execution. This was ruled with reference to section 178 (3) of the Chota-Nagpur Tenancy Act, 1908, which is moulded on section 155 of the Bengal Tenancy Act. A remedial provision of this character should be construed liberally so as not to restrict the remedy and fetter the discretion of the Court. Whether an order for extension of time should be made or not depends, however, upon the circumstances of the litigation, *i.e.*, upon the circumstances disclosed at the original trial and the events subsequent. We have carefully considered the matter from this point of view and taken into account all that has been urged for and against the application. We have arrived at the conclusion that the time for performance of the decree should be extended up to the 4th September next. The judgment-debtor will be at liberty to deposit in this Court, to the credit of the opposite parties, Rs. 125 on or before the 4th September next. If the deposit is so made the Rule will be made absolute and the order of the Court below will stand discharged; an order will also be made that the petitioner be forthwith restored to possession, and such order will be executed by the Court below as a decree of this Court. An order will also be made by consent of parties in the appeal now pending in this Court against the order for refusal to restore the appeal before the District Judge that the appeal do stand dismissed without costs. If, on the other hand, the deposit is not made as directed, the Rule will stand discharged. The final order in these proceedings will be drawn up in this Court according to the event

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which happens, that is, according as the deposit is or is not made within the time now fixed.

As the petitioner obtains an extension of time and fails in his objection to the execution, he must pay to the opposite party the costs of this Rule.

[NOTE. The deposit was eventually made and the Rule was made absolute.]

S. K. B.

CRIMINAL REVISION.

Before Sanderson C.J. and Richardson J.

1916

Aug. 10.

PRAFULLA KUMAR GHOSE

v.

HARENDRA NATH CHATTERJEE.*

*Sanction for Prosecution—Propriety of process under s. 500, Penal Code—
Discharge—Acquittal—Penal Code (Act XLV of 1860), ss. 211, 500—
Criminal Procedure Code (Act V of 1898), s. 195.*

Where an offence, though described as an offence under s. 500 of the Penal Code, still remains an offence "punishable" under s. 211. Process should not issue under the former section on the application of a person discharged or acquitted, when the Court has refused sanction under the latter section.

RULE obtained by Prafulla Kumar Ghose and another, petitioners.

Harendra Nath Chatterjee, the present complainant, was the accused in a prosecution under s. 409 of the Indian Penal Code, instituted by the two accused, the present petitioners. Dr. S. P. Sarbadhikary, Honorary Presidency Magistrate, Calcutta, who tried that

* Criminal Revision No. 702 of 1916, against the order of S. P. Sarbadhikari, Honorary Presidency Magistrate of Calcutta, dated May 15, 1916.

case, discharged the accused as there were not materials before him for the purpose of framing a charge. Thereupon, the said Harendra Nath Chatterjee submitted two applications (which were sent to the same Honorary Presidency Magistrate for disposal), one under s. 211 and the other under s. 500 of the Penal Code. After duly considering the two applications, he was of opinion that the ends of justice would be met if process were issued against the present two accused (now petitioners to the High Court) under s. 500 of the Penal Code, as their complaint had not been made in good faith. He accordingly dismissed the application for sanction as to section 211 of the Penal Code. Harendra Nath Chatterjee, thereupon, preferred an appeal to the High Court under section 195 of the Code of Criminal Procedure. This appeal was rejected as all the material then before the High Court was the order appealed from which was as follows: "The facts do not justify me in granting sanction under s. 211, Indian Penal Code. Application rejected," and the appellant had already then obtained process against the present two petitioners under section 500 of the Indian Penal Code. But at the hearing of the present Rule, the High Court had the advantage of the learned Magistrate's explanation.

Babu Manmatha Nath Mukerjee, Babu Khitish Chandra Sen and Babu Probodh Chandra Dutt, for the petitioners.

Babu Suresh Chandra Taluqdar for the opposite party.

SANDERSON C.J. In this case criminal proceedings were taken against the complainant, Harendra Nath Chatterjee, by the petitioners, Profulla Kumar Ghose and Jogesh Chandra Sarkar, under section 409 of the Indian Penal Code. The Magistrate, who enquired

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into the complaint in these proceedings, came to the conclusion that it could not be substantiated and discharged the accused person Harendra Nath Chatterjee. Thereupon, Harendra Nath Chatterjee applied for sanction under section 195 of the Criminal Procedure Code to prosecute Prafulla Chandra Ghose and Jogesh Chandra Sarkar under section 211 of the Indian Penal Code, and in the alternative asked for process against these two persons under section 500 of the Indian Penal Code. The Magistrate refused sanction under section 195 to Harendra Nath Chatterjee to prosecute the petitioners under section 211, but granted process under section 500.

An application was made to this Court by Mr. Manmatha Nath Mukerjee on behalf of the petitioners, Profulla Kumar Ghose and Jogesh Chandra Sarkar, and he obtained a Rule which was granted on two grounds: The first ground was that the facts alleged in the petition of the opposite party did not disclose any offence under section 500 of the Indian Penal Code or $\frac{500}{100}$ of the Indian Penal Code. The second ground was, that the petition for sanction to prosecute under section 211 of the Indian Penal Code having been rejected, the petitioners ought not to be proceeded against under section 500 or $\frac{500}{100}$ of the Indian Penal Code on the same facts.

The Magistrate has sent an explanation with regard to that Rule, and after setting out what occurred he said this: "As I found *prima facie* no lawful and reasonable ground for the action taken by the petitioners against the said Harendra Nath Chatterjee under section 409 of the Indian Penal Code and the allegations in the petition of complaint in reference to the same charge were not made in good faith, I ordered the issue of process under section 500 of the Indian Penal Code.

I am of opinion that this Rule ought to be made absolute upon the second ground which I have already mentioned; and I will give my reasons for that opinion directly.

A good deal of time has been taken up in arguing whether the statement in the complaint, assuming that it was untrue to the knowledge of the person who made it and was not made *boni fide*, was privileged, and incidentally, the question whether such a statement contained in a complaint was the subject of an unqualified privilege, or whether the only privilege which was applicable to defamation under the Indian Penal Code was that which is set out in the same Code; in other words, whether the statement of privileges contained in the Indian Penal Code was exhaustive or not. Upon this matter, I regret to say, that I find there are numerous conflicting authorities in the reports, and personally I should have been glad if this matter could have been referred to a Full Bench of this Court, in order that the matter might have been finally determined and settled one way or the other. But inasmuch as I am of opinion that the Rule ought to be made absolute upon the second ground, I do not think it would be fair or right to the petitioners to put upon them the burden and expense of having this case further adjourned in order that the point might be argued before a Full Bench.

With regard to the second ground, the reasons for my opinion are these. Having regard to the Magistrate's explanation which I have already read, if any offence was committed by the two petitioners, Prafulla Kumar Ghose and Jogesh Chandra Sarkar, to my mind, it was clearly an offence under section 211 of the Indian Penal Code. Section 211 says: "whoever with intent to cause injury to any person, institutes or causes to be instituted any criminal proceedings against that

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person, or falsely charges any person with having committed an offence knowing that there is no just or lawful ground for such proceedings or charge against that person shall be punished

. ” Now, the Magistrate found, as stated in his explanation, that the statement in the complaint was untrue, that the petitioners had no lawful or reasonable ground for the action that they took, and that therefore their complaint against Harendra Nath Chatterjee was not made in good faith. On those facts, if any offence was committed at all, it was clearly under section 211, and yet the Magistrate on those facts refused to give his sanction under section 195. I ought to have said that proceedings for that offence could not be taken without the sanction of the Magistrate and the Magistrate refused the sanction. The clear intention of the Legislature was that, with regard to such an offence as that, proceedings should not be taken unless the sanction of the Court which investigated the matter had been obtained. In this case, the Magistrate having refused sanction to prosecute under section 211 of the Indian Penal Code went on to allow process to issue in respect of an alleged offence under Section 500, that is to say, defamation, which would be based upon the facts which I have already referred to, namely, that the ‘statement in the complaint was untrue and that the petitioners had no lawful and reasonable ground for the action taken by them, and that it was made without *bonâ fides*.’ If that were allowed to be done, then I think the provision of the Legislature which is contained in section 195 of the Criminal Procedure Code might just as well be wiped out. I think it would be wrong for us to allow process to issue for an offence under section 500 when the facts alleged if they constituted an offence at all would amount to an offence under section 211 and the sanction

of the Magistrate necessary for a prosecution under section 211 had not been obtained. I think that the ground which I have already mentioned sums up the position, namely, that the petition for sanction to prosecute under section 211 of the Indian Penal Code having been rejected, the petitioners ought not to be proceeded against under section $\frac{500}{109}$ or 500 of the Indian Penal Code on the same facts.

For these reasons, I think, that the Rule should be made absolute.

Just one matter I wish to add, that is, with regard to the remark which the learned vakil who appeared for Harendra Nath Chatterjee made yesterday. He said that his client had been wrongly prosecuted and a false charge had been made against him and thereby a great reflection had been made upon his character: and unless he was allowed to go on with this prosecution he would remain under that reflection. I wish to say that the fact that we are making this Rule absolute does not reflect upon the character of Harendra Nath Chatterjee in any shape or form. No doubt a charge was made against him, but the Magistrate has come to the conclusion that there was no foundation for that charge and he has dismissed it. So far as Harendra Nath is concerned, he is able to walk the world as if no such charge has been made against him; there is no reflection against his character, so far as this Rule is concerned because the ground upon which we have made this Rule absolute does not depend upon the merits of the case.

RICHARDSON J. I agree. The question whether complainants and witnesses enjoy the same complete immunity in India as in England has been discussed in the various High Courts almost *ad nauseam* and has given rise to much difference of opinion. The

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stock arguments on the one side and the other are well known. On the present occasion it is unnecessary to consider those arguments or to hazard an opinion upon that question in its broader aspects. It is enough to say that in my opinion a person who having been accused of an offence by another, has been discharged or acquitted, cannot be allowed to evade the provisions of section 195 of the Criminal Procedure Code by preferring a complaint under section 500 of the Penal Code when leave has been refused to prosecute under section 211, the offence charged being clearly and essentially an offence under the latter section. The care taken to protect complainants from being harassed by prosecutions for instituting false cases is a clear indication that the Legislature never intended or contemplated that upon refusal of leave to prosecute under section 211, a person who has been discharged or acquitted should be allowed to fall back upon section 500. To permit such a course to be taken would render entirely nugatory the salutary provisions of section 195 of the Criminal Procedure Code.

The question, moreover, does not rest entirely upon inferences in regard to the intention of the Legislature. The offence charged in the present case, though it is described as an offence under section 500, is not altered by that description. It still remains an offence "punishable" under section 211. When the Magistrate had refused leave to prosecute under the latter section he ought not to have issued process under section 500.

There are only a few words I wish to add. It has been stated in the course of the argument on behalf of the opposite party that he appealed to this Court from the order refusing leave to prosecute under section 211 and that his appeal was rejected by a Bench of which I was the presiding Judge. When that appeal came

before us all that we had was the order of the learned Magistrate refusing sanction. The order is in these terms, "the facts do not justify me in granting sanction under section 211 of the Indian Penal Code. Application rejected." We took that order to mean that the Magistrate in the exercise of his discretion having considered the facts, had come to the conclusion that there was no ground for prosecution under section 211. The opposite party had then already obtained process against the petitioners under section 500 of the Penal Code. It was in those circumstances that we rejected the appeal. At that time we had not what I suppose must be called the advantage of the explanation which the learned Magistrate has submitted in the present case. That explanation puts an entirely different complexion upon the matter: and if it had been before us at the time of the hearing of the appeal, possibly we might have taken a different view. The fact, however, that the appeal was dismissed can be no ground for making an order in this case other than the order we now propose to make.

So far as the reputation of the opposite party may have suffered by the charge or complaint made against him, it is not his fault that he has not been able to bring the question of the falsity of that charge to an issue. He has done his best to do so and I trust that his reputation will not be affected by a failure which cannot be attributed in any degree to him.

With these observations I agree with the learned Chief Justice that the Rule should be made absolute.

G. S.

Rule absolute.

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APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C.J. and Mookerjee J.

1917

Jan. 2.

BRAJENDRA KISHORE ROY CHOWDHURY

v.

HINDUSTAN CO-OPERATIVE INSURANCE
SOCIETY, LD.*

Principal and Surety—Promissory note, payable on demand—Limitation—Payment of interest by principal—Acknowledgment of debt—Liability of surety—Contract of guarantee—Limitation Act (IX of 1908), ss. 18, 20, 21; Sch. I, Arts. 65, 73, 115—Contract Act (IX of 1872), ss. 126, 128.

Where an *on demand* promissory note was executed by the debtor and bore an endorsement on it "repayment guaranteed by me," signed by the person purporting to make the guarantee and where the said promissory note was unaccompanied by any writing, restraining or postponing the right to sue :

Held, that the endorsement must be treated as a contract of guarantee by the person purporting to make the guarantee.

Held, also, that the promissory note was a present debt payable with out demand, that the liability of the surety on the guarantee accrued from the date of the promissory note, that the Statute of Limitation began to run in favour of the surety from the date of the note, and that for the purposes of this case it mattered not whether Art. 65 or Art. 115 of the Limitation Act applied

Norton v. Ellam (1), *Rowe v. Young* (2), *Maltby v. Murrells* (3), *In re George* (4), *Perumal Ayyan v. Alagirisami Bhagavathar* (5), *Holl v. Hadley* (6), *Colvin v. Buckle* (7), *Srinath Roy v. Peary Mohan Mookerjee* (8) and *Dwarka Doss Govardhana Doss v. Chirakala Krishnaiya* (9) referred to.

* Appeal from Original Civil No. 19 of 1916 in Suit No. 1144 of 1914.

(1) (1837) 2 M. & W. 461.

(5) (1896) I. L. R. 20 Mad. 245.

(2) (1820) 2 Brod. & Bing. 165.

(6) (1835) 2 Ad. & El. 758.

(3) (1860) 5 H. & N. 812.

(7) (1841) 8 M. & W. 680.

(4) (1890) 44 Ch. D. 627.

(8) (1896) 25. C. L. J. 91.

(9) (1910) 21 Mad. L. J. 457.

Where payment of interest on an *on demand* promissory note was made by the principal debtor with the knowledge and consent of the surety and even at his request, but where there was no evidence that it was made on behalf of such surety :

Held, that the fresh period of limitation created under s. 20 of the Limitation Act by the payment of interest by the principal debtor could be only in respect of the debt upon which the interest was paid, *viz.*, the debt of the principal debtor. The fact that the interest was paid with the knowledge and consent of the surety and even at his request made no difference, unless the circumstances could be said to render the payment one on behalf of the surety.

Domi Lal Sahu v. Roshan Dobay (1), *In re Powers, Lindsell v. Phillips* (2), *In re Frisby* (3), *Lewin v. Wilson* (4) distinguished.

Krishto Kishori Chowdhurani v. Radha Romun Munshi (5), *Hajarimal v. Krishnarav* (6), *Coope v. Creswell* (7), *Morgan v. Rowlands* (8), *Green v. Humphreys* (9), *In re Boswell* (10), *Astbury v. Astbury* (11), *In re The Estate of William Seager* (12), and *Gardner v. Brooke* (13) referred to.

Per MOOKERJEE J. Though the liabilities of the debtor and the surety arise out of the same transaction, the liabilities of the two persons are distinct for the purposes of the application of s. 20 of the Limitation Act.

Gopal Daji Sathe v. Gopal bin Sonu Bait (14) and *Srinivasa Varadachariar v. Echanmal* (15) followed.

The surety, under the terms of the contract, is either jointly or separately liable, along with the principal debtor ; if the debts are deemed joint, s. 21(2) of the Limitation Act shows that the payment by one of them (the debtor) does not extend the time ; on the other hand, if the debts are deemed distinct, the same result follows upon a true construction of s. 20 itself. S. 128 of the Contract Act, which makes the liability of the surety co-extensive with that of the principal debtor, is of no assistance to the plaintiff, as it must be read along with the provisions of the Limitation Act ; it defines the measure of the liability and has no reference to the extinction of liability by operation of the Statute of Limitation.

A payment by one person cannot keep alive the remedy against another,

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| (1) (1906) I. L. R. 33 Calc. 1278. | (9) (1884) 26 Ch. D. 474. |
| (2) (1885) 30 Ch. D. 291. | (10) [1906] 2 Ch. 359. |
| (3) (1889) 43 Ch. D. 106. | (11) [1898] 2 Ch. 111. |
| (4) (1886) 11 App. Cas. 639. | (12) (1857) 3 Jur. N.S. 481 ; |
| (5) (1885) I. L. R. 12 Calc. 33). | 26 L. J. Ch. 809. |
| (6) (1881) I. L. R. 5 Bom. 647. | (13) (1897) 2 I. R. 6. |
| (7) (1866) L. R. 2 Eq. 106. | (14) (1903) I. L. R. 28 Bom. 248. |
| (8) (1872) L. R. 7 Q. B. 493. | (15) (1910) 21 Mad. L. J. 455. |

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unless the circumstances are such that payment by the one may be regarded as a payment for the others. There is nothing in the relation of principal and surety itself which makes payment by the principal binding as a payment by the surety.

Cockrill v. Sparks (1), *Re Wolmerhausen* (2) and *Henton v. Paddison* (3) referred to.

APPEAL by Brajendra Kishore Roy Chowdhury,
 the second defendant.

On the 25th April, 1911, one Hemendra Prosad Ghose executed a promissory note in favour of the Hindustan Co-operative Insurance Society, Limited, whereby he promised to pay *on demand* to the said Insurance Society or order the sum of Rs. 4,000, together with interest thereon at the rate of 9 per cent. per annum for value received. On the back of the promissory note Brajendra Kishore Roy Chowdhury made an endorsement on the same day as the execution thereof, guaranteeing repayment. On the 12th November, 1914, the Insurance Society instituted a suit on the promissory note making the principal debtor, Hemendra Prosad Ghose, defendant No. 1, and the guarantor, Brajendra Kishore Roy Chowdhury, defendant No. 2. The plaintiffs in their plaint alleged that the first defendant "on or about the 13th November, 1911, with the privity and knowledge of the second defendant and at his request paid to the plaintiff Corporation the sum of Rs. 200 on account of interest on the said loan secured by the said promissory note." The first defendant did not enter appearance. The second defendant in his written statement stated, *inter alia*, that the agreement to stand surety was made on the basis and subject to the condition that the loan should only be for 3 or 4 days, that he never agreed to any extension of time for the repayment of the loan,

(1) (1863) 1 H. & C. 699 ;
 130 R. R. 739.

(2) (1890) 62 L. T. 541.
 (3) (1893) 68 L. T. 405.

that he denied that he requested the first defendant to pay the said sum of Rs. 200 as interest or at all, that he denied that any such sum was paid with his consent, knowledge or privity as interest or at all, and that the suit as against him was barred by limitation. The suit was heard by Mr. Justice Chaudhuri. At the trial it appeared that the sum of Rs. 200 had been paid as interest by the first defendant on the 13th November, 1911, that the second defendant knew about such payment after it had been made, that the said sum had by error been credited to another transaction in the books of the plaintiff society, but that the error was subsequently rectified, on the 14th December, 1911, at the instance of the second defendant, who stated to the Secretary and Treasurer of the plaintiff society that he distinctly remembered being told by the second defendant, that the latter had paid Rs. 200 as interest on the loan guaranteed by him, and that, thereafter, about the end of December, 1911, the second defendant himself confirmed this statement at the office of the plaintiff society. The second defendant did not challenge the evidence given at the trial, but submitted that the claim against him was barred by limitation. Mr. Justice Chaudhuri decreed the suit against both the defendants. The second defendant, thereupon, appealed.

Mr. H. D. Bose (with him *Mr. C. O. Remfry*), for the appellant. The question in this appeal was not whether the surety was discharged, but whether the suit was barred by limitation as against him. An *on demand* promissory note became barred 3 years after the date of execution : Article 73 of the Limitation Act. The surety's liability arose immediately on the execution of that document, namely, on the 25th April, 1911, and the plaintiff society could have brought a suit

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against the surety on that date. Articles 81, 82 and 83 of the Limitation Act had no application. This case came under one of the following Articles, namely, Articles 65, 67 and 115. The Civil Procedure Code O. VII, r. 6, was referred to. Therefore, unless other circumstances supervened, the suit against the surety would be barred on the 25th April, 1914, as limitation would operate after 3 years from the date on which the guarantee was given. In the present case the surety's knowledge of payment of interest by the principal debtor was not an acknowledgment as contemplated by ss. 19, 20 or 21 of the Limitation Act. There was no evidence or finding that the payment when made was made with the knowledge or consent of the surety. The evidence was that the fact that the payment was made came to the surety's knowledge a month after it had been made, and then certain corrections were made in the books of the Insurance Society. Sections 124 and 126 to 147 of the Contract Act were referred to. The surety claimed exemption on the ground that payment of interest was not made by him or his agent. The cases *Dwarka Doss Govardhana Doss v. Chirakala Krishnaiya* (1) and *Srinath Ray v. Peary Mohan Mookerjee* (2) were relied on. Unless a person was an agent for a particular purpose, such as payment of interest, limitation would not run against him. If the payment of interest was made by the surety, or on his behalf, there would be no doubt that time would have been extended. Halsbury's Laws, Vol. 19, p. 46, section 70 and *Gopal Daji Sathe v. Gopal bin Sonu Bait* (3) were relied on. In that case the judgment of the Bombay High Court was correct and showed that there were distinct and separate liabilities and there might be separate periods of liability,

(1) (1910) 21 Mad. L. J. 457.

(2) (1896) 25C. L. J. 91

(3) (1903) I. L. R. 28 Bom. 248.

and unless the Court held that the payment was made by the surety or on his behalf and not merely that it came to his knowledge, limitation operated. Undoubtedly the payment of interest, so far as the person who made it was concerned, amounted to a new agreement, which operated against such person. The payment of interest by the principal did not save limitation against the surety: see *Srinivasa Varadachariar v. Echammal* (1) and *In re Frisby* (2). *Krishna Chandra Saha v. Bhairab Chandra Saha* (3) and *Domi Lal Sahu v. Roshan Dobay* (4) were not against the appellants. What they were authorities for, was the proposition, that where there was a valid mortgage and the mortgage had not been paid off, any purchaser of the equity of redemption purchased it as representative, and he could not say that limitation operated against him. The position in those cases was not the same as that of the appellant who was a surety, whose position was defined in *Rustomjee on Limitations*, p. 111.

Mr. C. O. Remfry (followed with the leave of the Court). A surety's liability depended on his contract. It might be joint or several. That was the reason why a surety was not referred to in section 21 of the Limitation Act: see *Ahsan-ul-lah v. Dakkhini Din* (5) followed in *Chandra Kumar Dhar v. Rim Din Poddar* (6). Under the English law the acknowledgment or payment by a several-contractor never bound another several-contractor [*Re Wolmerhausen* (7)]; the law was the same in India. The reason why an acknowledgment or payment gave a fresh period of limitation was that the law implied therefrom a pro-

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(1) (1910) 21 Mad. L. J. 455.

(4) (1906) I. L. R. 33 Calc. 1278.

(2) (1889) 43 Ch. D. 106.

(5) (1905) I. L. R. 27 All. 575.

(3) (1905) I. L. R. 32 Calc. 1077.

(6) (1912) 13 Ind. Cas. 702.

(7) (1890) 62 L. T. 541.

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mise to pay. The fact that a surety requested or urged the principal debtor to pay his debt implied a desire to avoid having to pay on his own liability therefor, and the law would not imply anything from an act contrary to the manifest intention of that act. In order to bind a surety the payment must be made by him or his agent. A request by a retiring partner to the continuing partner to pay the firm's debts, which the continuing partner bound himself to pay, was held insufficient to make a payment by such continuing partner a payment extending limitation against the retiring partner: *Watson v. Woodman* (1). Payment by the principal debtor with the consent and knowledge of the surety did not extend the period of limitation against the surety: *Cockrill v. Sparkes* (2), *Jackson v. Woolley* (3) and *Astbury v. Astbury* (4). Under section 20 of the Limitation Act the fresh period refers to the debt in respect of which the payment was made. A surety's debt was distinct from the principal debtor's debt and the decision in *Domi Lal Sahu v. Roshan Dobay* (5) did not apply to the case of distinct debts.

Mr. N. N. Sircar (with him *Mr. C. C. Ghose*), for the respondent society. The Articles of the Limitation Act which would be applicable depended on the view taken of the document. If this was a contract by the surety to pay *on demand*, then article 65 would apply. If this contention were not correct, then Article 120 would operate, inasmuch as there was no other Article which would cover this case. Article 59 applied to the person to whom the money was lent, that is, the principal debtor, while Article 73 was applicable to a person against whom a suit was

(1) (1875) L. R. 20 Eq. 721.

(3) (1858) 27 L. J. Q. B. 181.

(2) (1863) 1 H. & C. 699;

(4) [1898] 2 Ch. 111.

130 R. R. 739.

(5) (1906) I. L. R. 33 Cal. 1278.

brought on the promissory note but not to the surety in respect of a claim against him. Articles 81, 82 and 83 did not apply. As regards Article 115, it did not really matter whether this Article or Article 65 applied. No demand was necessary to give the plaintiff society a cause of action against the surety, but the surety was not liable until default was made by the principal debtor. The earliest date on which default could possibly be alleged to have been made, was the middle of December, 1911, and the suit was well within time. Furthermore, the payment of interest by the first defendant under the circumstances of this case had the effect of extending the period of limitation as regards not only himself, but the second defendant, the surety, as well. Under the Limitation Act, s. 20, the payment of such interest gave rise to a fresh period from which limitation must be reckoned and there was nothing in the legislature which would entitle the surety to claim exemption from the operation of this extension of time. Compare s. 21 of the Limitation Act with 19 and 20 Vict. c. 97 (Carson's Real Property Statutes, 2nd Edn., p. 241), where the word "co-debtor" appeared. *In re J. Brown's Estate* (1) was referred to. *Chandra Kumar Dhar v. Ram Din Poddar* (2) was not under s. 20, but under s. 19, of the Limitation Act and could not be reconciled with *Domi Lal Sahu v. Roshan Dobay* (3), which was a case under s. 20 and was relied on. *Gopal Daji Sathe v. Gopal bin Sonu Bait* (4) did not consider the case where there was an express authority to pay.

Mr. H. D. Bose, in reply. *In re Powers, Lindsell v. Phillips* (5) and *In re J. Brown's Estate* (1) were

(1) [1893] 2 Ch. 300.

(2) (1912) 13 Ind. Cas. 702.

(3) (1906) I. L. R. 33 Calc. 1278.

(4) (1903) I. L. R. 28 Bom. 248

(5) (1885) 30 Ch. D. 291.

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inapplicable. Bullen and Leake on Pleadings, 3rd Edn., p. 592 was referred to.

Cur. adv. vult.

SANDERSON C. J. This is an appeal by Brajendra Kishore Roy Chowdhury the second defendant against the judgment of Chaudhuri J., whereby he held that the claim against the second defendant was not barred by the Statute of Limitations. The facts of the case are not in dispute and are fully set out in the learned Judge's judgment as follows:—

“This is a suit on a Promissory Note against defendant No. 1 as the principal debtor and No. 2 as surety. They were interested in a bank at the time the note was made and the money was apparently borrowed for it. The promissory note was executed by defendant No. 1 on the 25th April, 1911, on the back of which defendant No. 2 made an endorsement on the same date, guaranteeing repayment. The suit was instituted on the 12th November, 1914. The plaint alleges that on the 13th November, 1911, defendant No. 1, with the privity and knowledge of defendant No. 2 and at his request, paid to the plaintiff Corporation Rs. 200 on account of interest on the said note. Defendant No. 1 has not appeared, but defendant No. 2 denies the allegation and submits that the suit is barred by the Statute of Limitations

The plaintiffs have proved payment of Rs. 200 as interest by the defendant No. 1 on the 13th November, 1911. They have further proved that the defendant No. 2 knew about such payment. It appears that the Medical Secretary and Treasurer of the plaintiff Corporation was under the impression that defendant No. 1 had not paid any part of the principal and interest on the loan, and complained about it to defendant No. 2, saying that the Society could not wait,

but must sue. Defendant No. 2, thereupon, told him, about the middle of December, 1911, 'wait a little. I know defendant No. 1 has paid interest on this loan.' The books were sent for and entry of a payment of Rs. 200 as interest, dated the 13th November, 1911, was found, but it appeared against another loan, which had been taken by defendant No. 1. Defendant No. 2, thereupon, said that he distinctly remembered being told by defendant No. 1, that he had paid Rs. 200 as interest on the loan guaranteed by him. He asked that the entry should be corrected and the correction was made in his presence. Thereafter, defendant No. 1 came to the office of the plaintiff Society about the end of December, 1911, and confirmed what defendant No. 2 had stated, adding that he had paid the amount as interest on the promissory note in suit, and that the office had made a mistake in crediting it against his other loan. The General Secretary of the Society says that shortly afterwards defendant No. 2, referring to this incident, 'complained to him in a half jesting way, saying that the Society had tried to do him out of Rs. 200, but he had prevented it.' In answer to his query, 'Is the matter all right now', defendant said, 'yes.' The attorney for the Society has been examined. He said that the plaint was engrossed on the 20th March, 1912, and was ready to be filed, but defendant No. 2's manager had a talk with him and the plaint was kept back in consequence. Defendant No. 2 had at one time been one of the Directors of the plaintiff Society and its Treasurer, and the plaintiff Society postponed filing the suit until it became absolutely necessary. Defendant No. 2 applied for postponement of the case on the ground of ill-health, and, as he was out of town, I was prepared to issue a commission for his examination, but the application was abandoned, and the defendant has, for

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purposes of this case, chosen not to challenge the evidence given, but submits that he is not affected by the payment of interest by the principal debtor, even if it be assumed that he consented to such payment and had knowledge of it."

The first question which arises is as to the correct meaning of the contract entered into by the defendant.

The contract of the principal debtor H. P. Ghose was on the promissory note to pay on demand the sum of Rs. 4,000 and interest at the rate of 9 per cent. per annum, and the second defendant signed an endorsement on the promissory note. "Repayment guaranteed by me." This, in my judgment, must be treated as a contract of guarantee by the second defendant, and it was not disputed that, in its interpretation, regard must be had to the terms of section 126 of the Contract Act of 1872.

The learned counsel for the respondent admitted that a demand upon the surety was not necessary under this contract, but argued that his liability did not arise until default was made by the principal debtor.

Having regard to the wording of the appellant's undertaking and section 126 of the Contract Act, in my judgment this is the correct interpretation, and the next question, therefore, to be considered is, when did default by the principal debtor occur.

The learned counsel for the respondent argued that, though it was not possible to specify the exact date of the principal debtor's default, the evidence in the case showed that it could not have been before the middle of December, 1911, when the incident referred to in the learned Judge's statement of facts occurred.

In my judgment, this contention should not be adopted.

The promissory note being payable on demand,

there was a present debt, which was payable without any demand.

In *Norton v. Ellam* (1), the note was one payable with interest on demand, and the question was from what time the Statute of Limitations began to run, and at page 464, Baron Parke says: "I entertain no doubt at all on this point. It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan. Where money is lent, simply, it is not denied that the statute begins to run from the time of lending. Then is there any difference where it is payable with interest? It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand, and the statute begins to run from the date of it. Then the stipulation for compensation in the shape of interest makes no difference, except that thereby the debt is continually increasing *de die in diem*. It is quite different from the case of a note payable at sight, because there, by the terms of the contract, it must be shown before the action is brought."

This is the English Law, and in my judgment it is the same here, and this is recognised by the provision in the Statute of Limitations, Article 73, which provides that in the case of a promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue, the period of limitation begins to run from the date of the note.

There is some evidence that originally the advance

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was intended to be for 2 or 3 days (see the letter of 25th April, 1911), and it is obvious that by the consent of the parties it was allowed to run on for much longer, but there was no qualification of the promise to pay on demand contained in the note.

The debt, therefore, of the principal debtor arose as soon as the advance was made and the promissory note was signed and the debtor was "in default" from the date of the promissory note.

Now it being admitted that a demand was not necessary to create the surety's liability, but that the surety was liable when default was made by the principal debtor, it follows in my judgment that in this case the liability of the surety on the guarantee accrued from the date of the promissory note.

In the case of a debt, as soon as the day of payment arrives, the default of the principal debtor is complete, and the surety, *apart from special stipulation*, is immediately liable to the full extent of his obligation without being entitled to notice, and the reason of the rule is, that it is the surety's duty to see that the principal pays his debt.

The next question is, what article of the Limitation Act applies to the case of the surety? In my judgment it must be either Article 65 or Article 115, and, for the purpose of this case, I do not think it matters which is applied. If 65 is applied, the period would run from the happening of the specified contingency, *viz.*, the default of the principal debtor, or, if 115 applies, the period would run from the time when the contract of guarantee was broken, *viz.*, the failure to repay the money on the default of the principal debtor.

In my judgment, therefore, unless the Statute of Limitation is prevented from running in the case of the surety by the payment made by the principal debtor

on the 13th November, 1911, the suit, which was brought on the 12th November, 1914, is barred in the case of the defendant No. 2.

The next question, therefore, is whether by reason of such payment a fresh period of limitation is to be computed, as far as the surety is concerned, from the time when the payment was made.

This depends upon section 20 of the Limitation Act. The words of that section, so far as it applies to the present case, are "where interest on a debt is before the expiration of the prescribed period paid as such by the person liable to pay the debt or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made."

Now, although the payment of interest by the principal debtor on the 13th November, 1911, was undoubtedly made with the knowledge and consent of the surety, and it may be, at his request, there is no evidence in my judgment that such payment was made on behalf of the surety. The point, therefore, to be considered is, whether in consequence of the payment of the interest by the principal debtor, by itself, a fresh period of limitation is to be computed from the time of such payment in the case of the surety.

In England the principle on which the effect of the Statute of Limitations was held to be avoided by the payment of principal or interest is that such payment is an acknowledgment of the existence of the debt from which is implied a new promise to pay the residue or the principal, as the case may be; and, therefore, it is obvious that a payment by one person, unless the circumstances are such that it must be regarded as a payment for another, cannot keep alive the remedy against that other, and there would seem to be nothing in the relation of principal and surety

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itself which makes payment by the principal binding as a payment by the surety.

The question, however, is whether section 20 of the Limitation Act has extended and amplified the effect of the payment by the principal debtor so as to keep alive the remedy against the surety.

It was argued that the words of the statute are simply "a fresh period of limitation shall be computed from the time when the payment was made" and that the statute does not confine the fresh period to the case of the person by whom the payment was made, but that the words are quite general, and reliance was placed on the judgment of Maclean, C. J., in *Domi Lal Sahu v. Roshan Dobay* (1), where he says as follows:—"It is contended that the section only creates a new period of limitation as against the person actually paying the money, and that as the respondent had purchased before this payment was made, the new period of limitation cannot take effect as against him. There is nothing in the language of the section to support that view, and there is nothing to warrant us in introducing words into the section which would authorise that view. The words of the section are general and plain. When the Legislature intends that a fresh period of limitation is to operate as against certain persons only, it says so in distinct terms: see section 18 of the Act. There is nothing in the section to indicate that the extension is only to operate against the person making the payment."

The facts of that case differed materially from those existing in the present case and the judgment must be read having regard to the facts of the case, and being so read that case in my judgment does not cover the present case. In *Domi Lal Sahu v. Roshan Dobay* (1), there was only one debt in question, viz., the

(1) (1906) I. L. R. 33 Cal. 1278, 1281.

mortgage debt, and inasmuch as the mortgagor had made payments to the mortgagee, it was held that such payments affected not only the mortgagor, but the respondent who was the purchaser of the equity of redemption and who of course claimed through the mortgagor.

In the present case there were in my judgment two debts, *viz.*, that of the principal debtor and that of the surety : see *In re Powers, Lindsell v. Phillips* (1) per Cotton L. J. at p. 295. The same view was taken by Jenkins C. J. in *Gopal Daji Sathe v. Gopal bin Sonu Bait* (2).

In my judgment the fresh period of limitation created under section 20 by the payment of interest by the principal debtor can be only in respect of the debt upon which the interest was paid, *viz.*, the debt of the principal debtor. The fact that the interest was paid with the knowledge and consent of the surety and even at his request, makes no difference unless the circumstances could be said to render the payment one on behalf of the surety, and in this case they do not.

Reliance was placed upon section 128 of the Contract Act. The section is as follows:—"The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract."

It was argued that inasmuch as the period of limitation had been extended by the payment of interest in the case of the principal debtor, it was also extended in the case of the surety, and that "co-extensive" applied not only to "quantum" but also to "time."

In my judgment, section 128, which is in the nature of an interpretation clause and is directed to defining the liability of a surety upon the terms of a

(1) (1885) 30 Ch. D. 291.

(2) (1903) I. L. R. 28 Bom. 248, 251.

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contract of guarantee, was not intended to affect the application of the Statute of Limitation.

In my judgment, the appeal should be allowed and judgment should be entered for the second defendant with costs in this Court and the Court of first instance.

MOOKERJEE J. This is an appeal by the second defendant in a suit for recovery of money due on a promissory note executed by the first defendant on the 25th April, 1911. The note was in these terms—

“On demand I promise to pay the Hindustan Co-operative Insurance Society, Ltd., or order the sum of rupees four thousand only together with interest thereon at the rate of nine per cent. per annum for value received.
 Hemendra Kumar Ghose.”

On the back of the note, the second defendant wrote as follows:

“Repayment guaranteed by me.

B. K. Roy Chowdhuri.”

On the 13th, November, 1911, the principal debtor paid Rs. 200 to the creditor on account of interest then due. The sum was at first credited by mistake to another transaction, but the error was rectified on the 14th, December, 1911. On the 12th, November, 1914, the plaintiff instituted the present suit against the principal debtor and the surety for recovery of principal and balance of interest due on the promissory note. The first defendant did not enter appearance. The second defendant pleaded the bar of limitation. Mr. Justice Chaudhuri has overruled this contention and has decreed the suit against both the defendants. On the present appeal by the surety, the objection has been reiterated that the claim against him is barred by limitation.

To determine the question in controversy, we have to ascertain which article of the first schedule to the Indian Limitation Act governs this case. The only

articles which have any possible application are those numbered 65 and 115. Article 65 provides that a suit for compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency, must be instituted within three years from the date when the time specified arrives or the contingency happens. Article 115 provides that a suit for compensation for the breach of any contract, express or implied, not in writing, registered and not herein specially provided for, must be instituted within three years from the date when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted, occurs, or where the breach is continuing, when it ceases. - There has been some divergence of judicial opinion upon the question, whether article 65 is applicable to a suit against a surety for recovery of money on his contract of guarantee. Hill J. in the case of *Srinath Roy v. Peary Mohan Mookerjee*(1) held that the article was applicable; the Court of Appeal (Petheram, C. J., Prinsep and Pigot JJ.) on the other hand ruled that Article 115 and not Article 65 was applicable. The point, however, was really immaterial in the circumstances of that case, as the claim against the surety was bound to fail whether the one article or the other was applied. It may be mentioned that the recent case of *Dwarka Doss Govardhana Doss v. Chirakala Krishnaiya* (2) is an authority for the proposition that Article 65 governs a suit of this description. For the purposes of the present case, it is not necessary to make a choice between Article 65 and Article 115, because, whichever article is applied, the time is found to run in favour of the surety from the same date, and the period applicable is also the same in both cases. Under Article 65, we have to determine

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(1) (1896) 25 C. L. J. 91.

(2) (1910) 21 Mad. L. J. 457.

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the "specific time" at which the surety promised to pay. Under Article 115, we have to determine the time when there was a breach of contract on the part of the surety. Consequently, from either point of view, the question is, what is the precise nature of the guarantee embodied in the expression "repayment guaranteed by me."

Section 126 of the Indian Contract Act defines a contract of guarantee as a contract to perform the promise or discharge the liability of a third person in case of his default. The question, accordingly, arises, when was the principal debtor in this case "in default." Under the law of England, it is well settled that a note payable on demand is a present debt and is due and payable at once without demand. In *Norton v. Ellam* (1), Baron Parke observed, that the debt which constitutes the cause of action arises instantly on the loan, so that the contract on the note is in a state of being broken perpetually if the party does not pay it. Baron Alderson added that the cases which have decided that the bringing the action is a demand, show that there has been a previous breach. It follows that on a note payable with interest on demand, the Statute of Limitations begins to run from the date of the note. To the same effect is the observation of Bayley J. in *Rowe v. Young* (2). "If a man make a note payable on demand, it is settled by law that a special demand need not be stated in the declaration nor proved upon the trial." In *Maltby v. Murrells* (3), Baron Channell emphasised this by the observation, "No demand is necessary before bringing an action upon such a note—its payment is a duty which attaches the moment the note is made." See also *In re George* (4). This principle finds recognition in Article

(1) (1837) 2 M. & W. 461.

(3) (1860) 5 H. & N. 812, 823.

(2) (1820) 2 Brod. & Bing. 165, 232. (4) (1890) 44 Ch. D. 627.

73 of the Indian Limitation Act, which provides that the time for the institution of a suit on a promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue, runs from the date of the note—[see also *Perumal Ayyan v. Alagirisami Bhagavathar* (1), where the correct conclusion is based on the doubtful ground that the words “on demand” must be regarded as a technical expression equivalent to “immediately” or “forthwith.”] From this point of view, it is obvious that in the present case the liability of the surety accrued on the execution of the note by the principal debtor, and, consequently, as between the surety and the creditor, the statute of limitations commenced to run in favour of the surety from the date of the promissory note when he became liable to repay to the creditor the sum advanced. This conclusion is in conformity with the principle deducible from the cases of *Holl v. Hadley* (2) and *Colvin v. Buckle* (3). It necessarily follows that the claim against the surety is *prima facie* barred by limitation under article 65 or article 115, unless one or other of the provisions comprised in part III of the Indian Limitation Act is applicable. The only provision on which reliance has been placed, on behalf of the plaintiff, to save the claim from the bar of limitation, is that contained in section 20 (1) of the Indian Limitation Act.

Section 20 (1) of the Indian Limitation Act—we quote only so much thereof as has any possible application to the case before us—is in these terms: “Where interest on a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or by his agent duly authorised in this behalf, a fresh period of limitation shall be

(1) (1896) I. L. R. 20 Mad. 245, 248. (2) (1835) 2 Ad. & El. 758.

(3) (1841) 8 M. & W. 680.

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computed from the time when the payment was made.” This must be read subject to the provisions of section 21 (2), which lays down that nothing in section 20 renders one of several joint contractors chargeable by reason only of a payment made by any other or others of them; this section apparently indicates the only cases in which and the conditions under which the Legislature allows the running of the period as against one person to be affected by the acts of another person, and the case of principal debtor and surety is not expressly or impliedly included in the section: see the observations of Westropp C. J. in *Hjarimal v. Krishnarav* (1). The plaintiff seeks to avail himself of the benefit of section 20 by proof that, in this case, the principal debtor did, on the 13th November, 1911, before the expiration of the prescribed period for the institution of a suit by the creditor to recover the money, pay interest thereon, with the result that the creditor became thereupon entitled to a fresh period of limitation from the date of the payment. Stress has been laid upon the generality of the expression “fresh period of limitation shall be computed” as used in section 20 (1), and reference has been made in this connection to the observations of Maclean C. J. in *Domi Lal Sahu v. Roshan Dobry* (2) [see also *Coope v. Cresswell* (3)]. The argument of the plaintiff in substance is that the fresh period runs, not merely against the principal debtor who makes the payment, but also against the surety; this view is sought to be fortified by the contrast between the phraseology of section 20 and section 18; in the latter case the period is extended only as against the party guilty of the fraud. This contention seems at first sight well founded, but, upon closer scrutiny, must be rejected as

(1) (1881) I.L.R. 5 Bom. 647, 652. (2) (1906) I.L.R. 33 Calc. 1278, 1281.

(3) (1866) L. R. 2 Eq. 107, 118.

fallacious. It is plain that the expression "fresh period of limitation" has reference to the institution of a suit for recovery of the "debt" mentioned previously. The question thus arises, is the debt of the principal debtor identical with the debt of the surety. If there is only one debt, the view may well be maintained that payment of interest by the principal debtor keeps alive the remedy against him as also against the surety. But if the debts must be deemed distinct, the payment of interest by the principal debtor cannot, notwithstanding the generality of the language of the section, extend the period of limitation for the institution of a suit for recovery of the debt of the surety. In my opinion, the true view is that though the liabilities of the debtor and the surety arise out of the same transaction, the liabilities of the two persons are distinct; their debts are distinct for purposes of the application of section 20. This was the view adopted by Jenkins C.J. in *Gopal Daji Sathe v. Gopal bin Sonu Bait* (1), and by Rahim J. in *Srinivasa Varadachariar v. Echammal* (2), and I accept the position as well founded on principle: *Maddox v. Duncan* (3), *Ross v. Jones* (4). It may further be observed that the surety, under the terms of the contract, is either jointly or separately liable, along with the principal debtor; if the debts are deemed joint, section 21 (2) shows that payment by one of them (the debtor) does not extend the time as against the other; on the other hand, if the debts are deemed distinct, the same result follows upon a true construction of section 20 itself. Section 128 of the Indian Contract Act, which makes the liability of the surety co-extensive with that of the principal debtor, is of no assistance to the plaintiff, as it must be read

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(1) (1903) I. L. R. 28 Bom 248. (3) (1898) 143 Mo. 613; 41 L. R.

(2) (1910) 21 Mad. L. J. 455. A. 581; 65 Am St. Rep. 678.

(4) (1874) 22 Wallace 576.

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along with the provisions of the Indian Limitation Act; it defines the measure of the liability, and has no reference to the extinction of liability by operation of the Statute of Limitations. It is plain that the view we take of the true effect of section 20 accords with the well-known principle which underlies the rule that the period of limitation is extended by part payment of principal or payment of interest. The true foundation of this doctrine is, that any such payment is an acknowledgment of the existence of the debt, and from it the law raises an implication of a promise to pay the residue or the principal, as the case may be: *Morgan v. Rowlands* (1), *Green v. Humphreys* (2), *In re Boswell* (3). Consequently, it is fairly obvious that a payment by one person cannot keep alive the remedy against another, [*Astbury v. Astbury* (4)], unless the circumstances are such that payment by the one may be regarded as a payment for the other. There is nothing in the relation of principal and surety itself which makes payment by the principal binding as a payment by the surety: *Cockrill v. Sparkes* (5), *Re Wolmerhausen* (6), *Henton v. Paddison* (7). In the case before us, there is, besides, no evidence to show that the payment by the principal debtor was in any sense a payment by the surety. There is thus no room for the application of the principle, which has sometimes been recognized, that payment of interest by the principal debtor, with the knowledge and consent of the surety, extends the period of limitation as to both [*Nichols v. Porter* (8), *Deaton v. Deaton* (9), *Devine v. Gentry* (10)]; conversely, payment

(1) (1872) L. R. 7 Q. B. 493.

(2) (1884) 26 Ch. D. 474.

(3) [1906] 2 Ch. 359, 365.

(4) [1898] 2 Ch. 111, 118.

(5) (1863) 1 H. & C. 699;
 130 R. R. 739.

(6) (1890) 62 L. T. 541.

(7) (1893) 68 L. T. 405.

(8) (1905) 181 Ind. 332;
 103 N. E. 842.

(9) (1884) 109 Ill. App. 7.

(10) (1914) 95 Neb. 150;
 145 N. W. 350.

by the surety may not keep the debt alive as against the principal debtor: *Suja v. Pahlwan* (1), *Coleman v. Forbes* (2), *In re The Estate of William Seager* (3), *Gardner v. Brooke* (4). The case of *Hajarimal v. Krishnarav* (5), approved in *Krishto Kishori Chowdhraïn v. Radha Romun Munshi* (6), shows that the remedy against the surety may continue, notwithstanding that the remedy against the principal debtor has become barred. The decisions in *In re Powers*, *Lindsell v. Phillips* (7), *In re Frisby* (8), and *Lewin v. Wilson* (9), are clearly distinguishable, as they are based on the assumption that a payment by one co-debtor prevents the statute from running against his co-debtor, a principle not recognized in section 21 of the Indian Limitation Act. I hold, accordingly, that, in this case, time commenced to run against the creditor in favour of the surety from the 24th April, 1911; that a fresh period of limitation did not become available to the creditor as against the surety by reason of the payment of interest by the principal debtor on the 13th November, 1911; and, that, consequently, the present suit, instituted on the 12th November, 1914, is barred against the surety by Article 65 or 115 of the Indian Limitation Act.

On these grounds, I agree that this appeal must be allowed and the claim against the surety dismissed with costs throughout.

O. M.

Appeal allowed.

Attorneys for the appellant: *G. C. Chunder & Co.*

Attorney for the respondents: *H. N. Datta.*

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| (1) (1878) P. R. 30. | (4) [1897] 2 I. R. 6. |
| (2) (1873) 22 Pa. St. 156 ; | (5) (1881) I. L. R. 5 Bom. 647. |
| 60 Am. Dec. 75 | (6) (1885) I. L. R. 12 Calc. 330. |
| (3) (1857) 3 Jur. N. S. 481 ; | (7) 1885) 30 Ch. D. 291. |
| 26 L. J. Ch. 809. | (8) (1889) 43 Ch. D. 106. |
| | (9) (1886) 11 App. Cas. 639. |

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CRIMINAL REVISION.*Before Teunon and Beachcroft JJ.*

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Jan. 11.

NALINI KANTA LAHA

v.

ANUKUL CHANDRA LAHA*.

Sanction for Prosecution—"Produce," meaning of—Document called for by a party and brought into Court, and referred to by his pleader and the Court—Antecedent forgery and user before the Sub-Registrar—Subsequent production of document in Court—Necessity of sanction—Criminal Procedure Code (Act VI of 1898), s. 195(1) (c).

Where a document was called for by a party to a proceeding under s. 145 of the Criminal Procedure Code, brought into Court and referred to by his pleader in argument and by the Magistrate in his judgment, though he expressly refrained from any opinion, as to its authenticity:—

Held, that the document was "produced" in the proceeding within the meaning of s. 195 (1) (c) of the Code.

Guru Charan Shaha v. Girija Sundari Dassi (1), *Akhil Chandra De v. Queen-Empress* (2), *Sew Bollok Singh v. Raindhin Bania* (3), and *In re Gopal Sidheshwar* (4) referred to.

Where, before complaint made, a document has been produced in a Court by a party to a proceeding before it, the sanction of such Court is necessary for his prosecution in respect of an antecedent forgery and antecedent user before a Sub-Registrar.

Teni Shah v. Bolahi Shah (5), *Empercr v. Bhawani Das* (6) and *Re Parameswaran Nambudri* (7) followed.

Noor Mahomed Cassum v. Kaikhosru Maneckjee (8) dissented from.

On the 10th October 1915, one Nirodamoyi Dasi executed a *kobala* in favour of Anukul Chandra Laha

* Criminal Revision No. 1078 of 1916, against the order of S. Bose, Deputy Magistrate of Howrah, dated Oct. 18, 1916.

(1) (1902) I. L. R. 29 Cal. 887.

(5) (1909) 14 C. W. N. 479.

(2) (1895) I. L. R. 22 Cal. 1004.

(6) (1915) I. L. R. 38 All. 169.

(3) (1910) 14 C. W. N. 806.

(7) (1915) I. L. R. 39 Mad. 677.

(4) (1907) 9 Bom. L. R. 735.

(8) (1902) 4 Bom. L. R. 268.

in respect of certain land. The document was presented at the Howrah Registry office on the 25th of October for registration which was refused. The next day Niroda appeared before the Sub-Registrar of Amta and registered another *kobala* relating to the same land purporting to have been executed by her on the 11th September in the name of the petitioner Fakir Chandra Chakravarti, but in favour of the petitioner Nalini Kanta Laha. Two days later Anukul presented a petition to the Amta Sub-Registrar alleging that the aforesaid *kobala* registered by him was a fraudulent and ante-dated document got up by Nalini in collusion with Niroda, Fakir, Amulya, Annada, Shashi and the stamp-vendor. The Sub-Registrar forwarded the petition to the Sub-divisional Officer who made it over to Babu U. C. Sil, a Sub-Deputy Magistrate, for inquiry. In the meantime, Anukul had appealed from the order refusing registration of his *kobala* to the Registrar, who was the District Magistrate of Howrah, and he, after holding an investigation, directed its registration by his order dated the 2nd December, 1915. An application was thereafter presented to the Registrar, who was the District Magistrate of Howrah, under s. 195 of the Criminal Procedure Code, against four of the petitioners and Niroda for offences under ss. 465, 467, and 471 of the Penal Code. Sanction was granted against the four petitioners in respect of the said offences on the 29th January 1916.

On the same date, a proceeding under s. 145 of the Criminal Procedure Code was instituted by the Sub-divisional Officer of Uluberia making Anukul and another the first, and Nalini with Fakir the second, parties. The case was then transferred for disposal to an Honorary Magistrate. Nalini applied to the latter, on the 8th March, for the production of his *kobala* from the file of Babu U. C. Sil for use

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in the s. 145 proceeding, and the Magistrate called for this and some other documents on the ground that reference to them was necessary for the purpose of the proceeding before him. Babu U. C. Sil accordingly sent up the whole file including Nalini's *kobala* to the Honorary Magistrate through the Sub-divisional Officer of Uluberia on the 15th instant. It appeared from the affidavit of Nalini in the High Court that the *kobala* was referred to by his pleader during his argument in the s. 145 case when he was stopped by the Court with the remark that it would not decide the question of the genuineness of the document. It further appeared from the Explanation submitted to the High Court on the Rule that Nalini's *kobala* had not been "filed" nor exhibited in evidence in the s. 145 proceeding. The Honorary Magistrate referred to it in his judgment, dated the 29th March 1916, but refrained from expressing any opinion as to its genuineness.

On the 10th May 1916, Babu U. C. Sil sent up a report to the effect that Nalini's *kobala* was "brought into being in collusion with the stamp-vendor and others." Nalini then instituted a suit on the 7th July against Anukul and others, in the Court of the Second Munsif of Amta, for possession of the land covered by his *kobala*. On the 12th July, Anukul filed a complaint against the four petitioners under ss. 465, 467 and 471 of the Penal Code before the District Magistrate in respect of the antecedent forgery and user of the *kobala* before the Sub-Registrar of Amta. The complaint was made over to Babu S. B. Bose, a senior Deputy Magistrate of Howrah, who issued warrants against the four petitioners under the sections named. On the 2nd August a supplementary complaint was put in against the fifth petitioner, Shashi, on the same charges.

The Sessions Judge of Hooghly set aside the sanction of the 29th January on the ground that, the Registrar not being a "Court" under s. 195 of the Code, no such sanction was necessary. Anukul thereupon filed a petition before Babu S. B. Bose praying him to proceed with the case without sanction against all the petitioners on the basis of the complaints of the 12th July and 2nd August: and warrants were issued against them under the same sections.

The petitioners then obtained the present Rule to set aside the criminal proceedings for want of sanction or to stay them pending the decision of the civil suit.

Babu Jyotish Chunder Hazra (with him *Babu Dasrathi Sanyal* and *Babu Manmatha Nath Mukerjee*), for the petitioners. The petitioner Nalini called for his *kobala* by application dated 8th March. It was sent up to the Honorary Magistrate and used by the pleader during his argument. The Magistrate has also referred to it in his judgment. The document was "produced." Sanction is necessary to prosecute the petitioners Nalini and Fakir, who were parties to the s. 145 case: *Giridhari Marwari v. Emperor* (1) and *Emperor v. Bhawani Das* (2). In any case the criminal proceedings should be stayed pending the civil suit, the main issues being the same.

Mr. Monnier, for the Crown. The Honorary Magistrate passed no order on Nalini's application. The document was brought into Court but the Explanation shows it was not *filed* nor made an exhibit in the case. The attempt of the pleader to use it when not exhibited in the s. 145 case, and the reference to it in the Magistrate's judgment for the purpose of disclaiming any decision as to its genuineness, do not amount to "production" in the s. 145 proceeding within s. 195(1)(c).

(1) (1908) 12 C. W. N. 822.

(2) (1915) I. L. R. 38 All. 169.

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In the next place, the presentation of a forged document for registration is "user" within s. 471 of the Penal Code: see *Queen v. Azimooddeen* (1). The petitioners committed an offence before the Amta Sub-Registrar and a separate and distinct offence if it was produced in the s. 145 case. The complaint is expressly limited to the first user, and no sanction is necessary to the prosecution of the petitioners under ss. 465, 467 and 471 of the Penal Code, the Registrar not being a "Court." Further the petitioners were not parties at the time of the first user and no sanction is required: *Noor Mahomed Cassum v. Kaikhosru Maneckjee* (2), *Emperor v. Latta Prasad* (3). Clearly no sanction would be necessary when the complaint preceded the production of a document in any proceeding: *Re Parameswaran Nambudri* (4), *Emperor v. Bhawani Das* (5); and hence the case of *Giridhari Marwari v. Emperor* (6) is open to question as the civil suit was subsequent to the complaint. Though followed in *Emperor v. Bhawani Das* (5) it is opposed to the view expressed in the same case at pages 174 and 175. In *Teni Shah v. Bolahi Shah* (7) the complaint was with reference to the user in the High Court and is distinguishable. The Madras case cited by me has considered these decisions and has apparently accepted the ruling in *Noor Mahomed Cassum v. Kaikhosru Maneckjee* (2) as a correct interpretation of s. 195 (1) (c). The word "committed" in cl. (c) means committed in the course of the proceeding, and does not cover a case of antecedent forgery or user. Cl. (b) is wider than cl. (c) and may apply to such antecedent offences, but cl. (c) is limited to offences committed during the

(1) (1869) 11 W. R. Cr. 15.

(4) (1915) I. L. R. 39 Mad. 677, 679.

(2) (1902) 4 Bom. L. R. 268.

(5) (1915) I. L. R. 38 All. 169, 174.

(3) (1912) I. L. R. 34 All. 654.

(6) (1908) 12 C. W. N. 822.

(7) (1909) 14 C. W. N. 479.

pendency of the proceeding. In any case no sanction is necessary with regard to the petitioners who were not parties to the s. 145 inquiry: *Debi Lal v. Dhajadari Gashai* (1). There is no hard and fast rule that a prosecution must be stayed whenever a civil suit is pending: *Brojobashi Panda v. Emperor* (2), but only for good cause: *Dwarka Nath Rai Chowdhry v. Emperor* (3). At all events the matter should be left to the discretion of the Magistrate as was done in *Raj Kumari Debi v. Bama Sundari Debi* (4), *In re Shri Nana Maharaj* (5) and *Dwarka Nath Rai Chowdhry v. Emperor* (3).

Babu Atulya Charan Bose, Babu Birbhusan Dutt and *Babu Jagat Chander Bose*, for the complainant, did not address the Court.

Babu Dasarathi Sunyal, in reply, referred to *In re Gopal Sidheshwar* (6) and *Teni Shah v. Bolahi Shah* (7).

Cur. adv. vult.

TEUNON AND BEACHCROFT JJ. In this case it appears that proceedings under sections 465, 467 and 471 of the Indian Penal Code have been taken in the Court of the Senior Deputy Magistrate of Howrah, against the petitioners. These proceedings are in respect of a deed of sale executed by one Nirodamoyi Dasi in favour of petitioner No. 1, Nalini Kanta Laha, though ostensibly in favour of petitioner No. 3, Fakir Chandra Chakravarti. The document bears date 11th September 1915, and was registered on the 26th October 1915 before the Sub-Registrar of Amta.

The complainant in the proceedings is one Anukul

(1) (1911) 15 C. W. N. 565.

(2) (1908) 13 C. W. N. 398.

(3) (1904) I. L. R. 31 Calc. 858.

(4) (1896) I. L. R. 23 Calc. 610.

(5) (1892) I. L. R. 16 Bom. 729.

(6) (1907) 9 Bom. L. R. 735.

(7) (1909) 14 C. W. N. 479.

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Chandra Laha, who holds a conveyance of the same plot of land purporting to have been executed by Nirodamoyi, on the 10th October 1915. This document was presented for registration to the Sub-Registrar of Howrah on the 25th of October and was ultimately registered under the order of the District Registrar, on the 2nd December 1915. The complainant's case is that the document in favour of Nalini Kanta and Fakir Chandra has been fraudulently ante-dated, and his complaint was made before the District Magistrate of Howrah as against the 1st, 3rd, 4th and 5th petitioners on the 12th July 1916, and as against the 2nd petitioner on the 2nd August 1916. Both complaints were transferred by the District Magistrate to the Deputy Magistrate for disposal.

The complaints, it may be observed, were made after preliminary proceedings which continued before the Sub-Registrar of Amta, the District Registrar, and an enquiring officer, from the 28th of October 1915 to the 29th of June 1916.

The offences charged are the alleged fabrication of the document on or about the 26th of October 1915, and the fraudulent use thereof before the Sub-Registrar of Amta on that date.

Meanwhile, on the 29th of January 1916, proceedings under section 145 of the Criminal Procedure Code had been taken in the Court of the Sub-divisional Magistrate of Uluberia against complainant Anukul as the first party and against the present petitioners Nalini and Fakir as the second party. These proceedings were disposed of by an Honorary Magistrate to whom they had been transferred on the 29th of March 1916.

It may be next observed that on the 7th July 1916, *i.e.*, four days before the first complaint in the Criminal Court and about a month before the

second, the petitioner Nalini brought a suit on the document in the Court of the Second Munsif at Amta. In this suit the complainant Anukul is the defendant, and the essential question in that suit will be whether the document, which is the subject of the present criminal proceedings, is or is not a genuine document.

On behalf of the petitioner it is then contended before us, *first*, that in the proceedings before the Honorary Magistrate under section 145 of the Code of Criminal Procedure, to which the petitioners Nalini and Fakir were parties, the document now in question was "produced or given in evidence," and that, therefore, under the provisions of section 195(1) (c) the absence of the said Magistrate's sanction is a bar to the criminal proceedings in respect of the antecedent forgery and the antecedent user before the Sub-Registrar of Amta. It is, *secondly*, contended that the institution of the civil suit in the Court of the Second Munsif at Howrah, having preceded the complaint on which the criminal proceedings have been taken, these proceedings should await the determination of that suit.

We have then first to ascertain whether the document was in fact "produced or given in evidence" in the course of the section 145 proceedings. When these proceedings were pending, the document, it appears, was on the record of a case instituted against the stamp-vendor, Doyal Sah, and on the 8th of March the present petitioner Nalini Kanta Laha presented a petition to the Honorary Magistrate in which he prayed that the document should be called for and used in the section 145 proceedings. Thereupon, on the 11th of March, the Honorary Magistrate called for this document and other documents on the ground that reference to them was essentially necessary, and the document was accordingly transmitted to him by

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the Sub-divisional Officer of Uluberia, on the 15th of March.

We next find that in the course of the argument the pleader for the second party, Nalini and Fakir, made use of the document, and that in his judgment the Honorary Magistrate refers to it though he refrains from expressing any opinion on its authenticity. On these facts we think that we ought to hold that in the proceedings in the Court of the Honorary Magistrate of Amta the document was "produced" within the meaning of section 195 (1) (c). In support of this view we may refer to the cases of *Guru Charan Shaha v. Girija Sundari Dassi* (1), *Akhil Chandra De v. Queen Empress* (2), *Sew Bollok Singh v. Ramdhin Bania* (3), and *In re Gopal Sidheshwar* (4).

The question then is whether this production makes a sanction necessary before the petitioners, Nalini and Fakir, who were parties to the proceedings under section 145 of the Code of Criminal Procedure, can be prosecuted in respect of the antecedent forgery and the antecedent user before the Sub-Registrar.

The Crown contends that such sanction is necessary only when the offences charged have been committed by the persons accused as and when parties to the proceedings in which the production took place.

The language of section 195 (1) (c) is by no means clear and would seem to admit of either construction, but though the contention on behalf of the Crown is supported by the case of *Noor Muhomed Cassum v. Krikhosru Maneckjee* (5), we are of opinion that this is unduly to limit the scope of the sub-clause under consideration. The view urged on behalf of the petitioner has been taken in *Teni Shah v. Bolahi Shah* (6),

(1) (1902) I. L. R. 29 Calc. 887.

(4) (1907) 9 Bom. L. R. 735.

(2) (1895) I. L. R. 22 Calc. 1004.

(5) (1902) 4 Bom. L. R. 268.

(3) (1910) 14 C. W. N. 806

(6) (1909) 14 C. W. N. 479.

Emperor v. Bhawani Das (1), and is also supported by the course of reasoning followed in *Re Parameswaran Nambudri* (2). With these decisions we agree, and in this view the prosecution of the principal petitioners, Nalini and Fakir Chandra, cannot proceed without sanction. The other three petitioners, who are charged as accessories, were not parties to the case under section 145 of the Code of Criminal Procedure, but it is not desirable that proceedings should be taken piecemeal or against the abettors while there is still a bar to the prosecution of the principals.

In this view, it is unnecessary to discuss the second contention advanced on behalf of the petitioners.

For the reasons given, we quash the proceedings now taken against the petitioners, Nalini and Fakir, and stay the proceedings against the remaining three petitioners until the bar to a prosecution of the principals has been removed.

E. H. M.

Rule absolute.

(1) (1915) I. L. R. 38 All. 169.

(2) (1915) I. L. R. 39 Mad. 677.

CIVIL RULE.

Before N. R. Chatterjea and Newbould JJ.

PYARI MOHAN KUNDU

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Feb. 12.

Review—Application for review subsequent to filing of second appeal—Civil Procedure Code (Act V of 1908) s. 114 ; O. XLVII, r. 1.

Where an application for review of judgment is filed and later, during the pendency of the same, an appeal is preferred :—

Held, that the Court has power and in fact is bound to proceed with the

* Civil Rule No. 732 of 1916, against the order of Achiuta Nath Mitra, Subordinate Judge of Barisal, dated Aug. 5, 1916.

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application for review of judgment notwithstanding the fact that an appeal has been subsequently filed. But the power exists so long as the appeal is not heard.

Bharat Chandra Marundar v. Ramgunga Sen (1), *Chenna Reddi v. Peddaobi Reddi* (2) followed.

Thacoor Prosad v. Baluck Ram (3), *Sarat Chandra Dhal v. Damodar Manna* (4), *Narayan Purushottam Gargote v. Laxmibai* (5) referred to.

On the other hand, if the application is successful, the appeal cannot proceed.

Kanhaiya Lal v. Baldeo Prasad (6) referred to.

CIVIL RULE obtained by Pyari Mohan Kundu, the petitioner.

The facts briefly are these. A decree was obtained against the petitioner, Pyari Mohan Kundu, who preferred an appeal. The appeal was heard and dismissed on the 24th March 1916. The petitioner thereupon filed an application for review of judgment on the 26th June 1916. During the pendency of that application the petitioner on the 4th July 1916 filed an appeal to the High Court. On the 5th August 1916, the application for review came up for hearing and the lower Appellate Court dismissed the same holding that an appeal having been preferred it could not entertain the application for review.

From this order the petitioner moved the High Court and obtained this Rule.

Babu Dwarka Nath Chuckerbutty (with him *Babu Ramesh Chandra Sen*), for the petitioner, contended that the lower Appellate Court had jurisdiction to dispose of the application for review on the merits and it had failed to exercise that jurisdiction. The subsequent filing of the appeal did not make the application for review incompetent, though the appeal

(1) (1866) B. L. R. (F. B.) 362.

(2) (1909) I. L. R. 32 Mad. 416.

(3) (1882) 12 C. L. R. 64.

(4) (1908) 12 C. W. N. 885.

(5) (1914) I. L. R. 38 Bom. 416.

(6) (1905) I. L. R. 28 All. 240.

could not proceed. If that application succeeded and the judgment and decree were set aside or modified, the questions raised in the application for review may be questions of law as well as facts which could not be challenged on second appeal. If the filing of the second appeal were delayed until the disposal of the application for review, the time for filing an appeal may have expired. The only practical course was to apply for review first, then to file the second appeal, and if the former succeeded then to withdraw the latter, but if it failed to proceed with the appeal. The Court was bound to dispose of the application for review which was filed before the appeal: *Bharat Chandra Mazumdar v. Ramgunga Sen* (1), *Thacoor Prosad v. Baluck Ram* (2), *Sarat Chandra Dhal v. Damodar Manna* (3), *Narayan Purushottam Gargote v. Laxmibai* (4), *Chenna Reddi v. Peddaobi Reddi* (5), *Kanhaiya Lal v. Baldeo Prasad* (6).

Babu Ramani Mohan Chatterjee, for the opposite party, contended that the petitioner did not want to press the application for review hence he filed the second appeal. The order showed that the petitioner's *karmachari* informed the Court that a second appeal had been filed.

[CHATTERJEE J. The application was rejected on the ground that the Court had no jurisdiction to entertain it and not on the ground that it was not pressed. The *karmachari* only stated what was a fact.]

The petitioner was availing himself of two remedies simultaneously. He could raise the same questions on second appeal. The application for review was unnecessary. A party who had appealed could not proceed with an application for review, such a

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course would come within the prohibition of s. 114 and O. XLVII, r. 1 of the Code of Civil Procedure.

N. R. CHATTERJEA AND NEWBOULD JJ. We are invited in this Rule to set aside an order passed by the Court below refusing to hear an application for review of a judgment presented to it by the petitioner, on the ground that an appeal had been preferred against the decree to this Court. The application for review, it appears, was filed on the 26th June 1916 and the appeal to this Court was not preferred until the 4th of July. The application for review, therefore, was filed before any appeal was preferred to this Court. Section 114 of the Civil Procedure Code lays down that "any person considering himself aggrieved by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred, may apply for a review of judgment." It is clear from that section that an application for review can be made before any appeal has been preferred. That being so the question is whether there is anything in the Civil Procedure Code to prevent the Court from proceeding with the application for review notwithstanding the pendency of the appeal. The question has been considered in several cases. One of the earliest cases in this Court is *Bharat Chandra Mazumdar v. Ramgunga Sen* (1), where, in delivering the judgment of the Full Bench, the learned Judges observed: "It is clear that, if a review be applied for in proper time and before an appeal has been preferred, the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of appeal, and he has full power, and is bound to proceed under the application for review." That case was decided under Act VIII of 1859; but, so far as this question is

(1) (1866) B. L. R. (F. B.) 362.

concerned, section 376 of that Act has substantially been re-enacted in section 114 of the present Code. [See *Thacoor Prasad v. Baluck Ram* (1), *Sarat Chandra Dhal v. Damodar Manna* (2)]. The same view has been taken in the Bombay and Madras High Courts. See *Narayan Purushottam Gargote v. Laxmibai* (3) and *Chenna Reddi v. Peddaobi Reddi* (4), the last one being a decision of the Full Bench. We agree with the observations made in that case and which run as follows: "The Legislature has thus conferred upon the party a right to apply for review and upon the Court jurisdiction to entertain the application, and has directed how it shall be dealt with. When a right and a jurisdiction are conferred expressly by statute in this way it appears to me that they cannot be taken away or cut down except by express words or necessary implication. There are no express words and the question therefore is,—is there any necessary implication? No such implication arises from the terms of section 623 itself which provides, by way of exception, that, in certain cases, an application for review may be made even after an appeal has been filed and if the Court can proceed to hear such an application why not also an application made before the filing of an appeal?" Having regard to the terms of the section and the cases referred to above, we are of opinion that the Court has power, and in fact is bound to proceed with the application for review notwithstanding the fact that an appeal has been subsequently filed in the case. But that power exists so long as the appeal is not heard, because once the appeal is heard, the decree on appeal is the final decree in the case, and the application for review of judgment of the Court of first instance can no longer be proceeded

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with. Whether it can be so proceeded with (after the appeal is heard) in cases coming under Order XLVII, r. 1 (2), it is unnecessary for us to consider. On the other hand, if the application for review is successful, the appeal cannot proceed. See *Kanhaiya Lal v. Baldeo Prasad* (1). The appeal in the present case has not yet been heard under Order XLI, rule 11 of the Civil Procedure Code. The appellant undertakes to have the hearing of the appeal stayed until the decision of the application for review. We, therefore, make the Rule absolute, set aside the order of the lower Court and direct that the application for review be taken up and disposed of without delay. The petitioner is entitled to his costs in this Rule from the opposite party.

Let the record be sent down without delay.

L. R.

Rule absolute.

(1) (1905) I. L. R. 28 All. 240.

INSOLVENCY JURISDICTION.

Before Greaves J.

1917

March 23.

Re PREM LAL DHAR.*Ex parte* THE OFFICIAL ASSIGNEE.*

Insolvency—Order of administration—Attachment by creditor prior to order—Sale after order—Rights of attaching creditor—Presidency Towns Insolvency Act (III of 1909), ss. 53 (1), 108, 109.

Section 53 (1) of the Presidency Towns Insolvency Act does not apply to an administration of the insolvent estate of a deceased person under sections 108 and 109 of the Act. But as an attachment in this country only prevents alienation and does not confer any title or create any charge or lien on the attached property such as attaches in England upon seizure

* Ordinary Original Insolvency Suit No. 24 of 1917.

under a writ of *fi. fa.*, a creditor who has attached property in execution of a decree has no rights therein prior to sale and, upon the making of an administration order before the property is sold, the property vests in the Official Assignee, and the attaching creditor is relegated to the same position as the other creditors and the sale-proceeds are distributable rateably.

Peacock v. Madan Gopal (1), *Raghunath Das v. Sundar Das Khetri* (2) followed.

Hasluck v. Clark (3), *Johnson v. Pickering* (4), *In re Clarke* (5), *Ex parte William*. *In re Davies* (6), *Slater v. Pinder* (7) considered.

APPLICATION.

On the 24th July, 1916, Messrs. Blackwood, Blackwood & Co. obtained a decree for Rs. 5,541-8-6 in suit No. 694 of 1916 against Sreemati Sukumari Dasee, the widow and administratrix of Prem Lal Dhar, deceased. On the 31st August 1916, Messrs. Blackwood, Blackwood & Co. in execution of their decree, attached, *inter alia*, an undivided one-fourth share of No. 58-1, Wellington Street, which formed part of the estate of Prem Lal Dhar, deceased, and on the 18th December, 1916, obtained an order from the Court that the Sheriff should sell the attached premises and that the sale-proceeds, less the Sheriff's poundage and charges, should be placed to the credit of their suit. On the 23rd February, 1917, on the petition of one Upendra Mohan Chowdhury, a creditor of the estate of Prem Lal Dhar, deceased, an order was made by this Court in its Insolvency jurisdiction under section 108 of the Presidency Towns Insolvency Act (III of 1909) for the administration in insolvency of the estate of Prem Lal Dhar, deceased. Notice of this order was given the same day to the attorneys of Messrs. Black-

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| (2) (1914) I. L. R. 42 Calc. 72 ; | (5) [1898] 1 Ch. 336. |
| L. R. 41 I. A. 251. | (6) (1872) 7 Ch. 314. |
| (3) [1898] 2 Q. B. 28 ; | (7) (1871) 6 Exch. 236 ; |
| [1899] 1 Q. B. 699. | (1872) 7 Exch. 95. |

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wood, Blackwood & Co. by the attorney of Upendra Mohan Chowdhury and he requested them not to proceed further with the execution proceedings. The sale of the attached premises was ultimately fixed by the Sheriff for the 16th March, 1917, and on this being brought to the notice of the Official Assignee on the 15th March, he wrote to the Sheriff informing him of the order of the 23rd February and requesting him to stay the sale, and he also sent a copy of his letter to the Sheriff to the attorneys of Messrs. Blackwood, Blackwood & Co. The sale, however, was proceeded with and the premises were sold. Thereupon, this application was made by the Official Assignee on the 19th March for an order that the sale in execution of Messrs. Blackwood, Blackwood & Co.'s decree be set aside, or in the alternative that the sale-proceeds be paid by the Sheriff to the Official Assignee.

Mr. A. N. Chaudhuri (with him *Mr. J. N. Mitter*), for the Official Assignee. By the order of the 23rd February 1917, the estate of Prem Lal Dhar vested in the Official Assignee. Messrs. Blackwood, Blackwood & Co. by their attachment acquired no charge or lien on the property. As the property had not been brought to sale prior to the order of the 23rd February, the execution creditor is not entitled to the benefit of the execution against the Official Assignee. I rely on section 53 (1) read with sections 108 and 109 of the Presidency Towns Insolvency Act.

Mr. C. C. Ghose, for Messrs. Blackwood, Blackwood & Co. The order of the 23rd February, 1917, did not affect our right to proceed with the sale and to be paid the amount of our decree and costs out of the sale-proceeds. Section 53 (1) is not applicable to an order for administration of the insolvent estate of a deceased person under sections 108 and 109. Under the corresponding sections of the English Bankruptcy Act of

1883 (46 & 47 Vict. c. 52), the Courts in England have held that an order for administration under section 125 is not equivalent to a receiving order for the purposes of section 45 of that Act, so as to disentitle an execution-creditor of a deceased debtor to retain the benefit of his execution in cases in which he has not completed the execution before the date of the administration order. I rely on *Hasluck v. Clark* (1). The effect of that decision is that the property which vests under the administration order is the property of the deceased, subject to any rights or liabilities which have attached to it in his hands: *Johnson v. Pickering* (2). The Official Assignee in the circumstances of this case can only get the property subject to my rights. I submit the principles of *Hasluck v. Clark* (1) apply to this case and that decision is an authority in my favour. I refer your Lordship also to the cases of *In re Clarke* (3), *Ex parte Williams*, *In re Davies* (4), and *Slater v. Pinder* (5).

Mr. A. N. Chaudhuri, in reply. The decision in *Hasluck v. Clark* (1) has no application. That decision was based on the provisions of the Sale of Goods Act (56 & 57 Vict. c. 71). English authorities cannot be of any assistance in this case. In England upon seizure under a writ of *fi. fa.*, the attaching creditor acquires some sort of right over the property in the nature of a lien or charge. Attachment in this country creates no such rights. It only prevents alienation: *Peacock v. Madan Gopal* (6), *Raghunath Das v. Sundar Das Khetri* (7).

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(6) (1902) I. L. R. 29 Calc. 428.

(7) (1914) I. L. R. 42 Calc. 72 ;

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GREAVES J. This is an application in Insolvency to set aside an execution sale of an undivided one-fourth share of the premises No. 58-1 Wellington Street, made in suit No. 694 of 1916, or in the alternative for an order directing the Sheriff to pay the sale-proceeds to the Official Assignee. The application in terms is to set aside the sale of the premises and no share is specified, but this is clearly wrong. On the 24th July, 1916, Messrs. Blackwood, Blackwood & Co. obtained a decree for Rs. 5,541-8-6 in suit No. 694 of 1916 against Sreemati Sukumari Dasee, the widow and administratrix of Prem Lal Dhar, deceased.

Messrs. Blackwood, Blackwood & Co. on the 31st August, 1916, in execution of this decree attached, *inter alia*, an undivided one-fourth share of No. 58-1, Wellington Street, which formed part of the estate of Prem Lal Dhar, deceased. By an order of this Court, dated the 8th December, 1916, and made in suit No. 694 of 1916, the Sheriff was directed to sell, *inter alia*, these premises in execution of the decree and to pay the money arising from such sale, less his poundage and charges to the Comptroller-General of Accounts with the privity of the Accountant-General, to be placed by them to the credit of this suit subject to further order. By an order dated the 23rd February, 1917, made in insolvency, on the petition No. 24 of 1917 of one Upendra Mohan Chowdhury, a creditor of the estate of Prem Lal Dhar deceased, it was ordered that the estate of Prem Lal Dhar deceased should be administered in insolvency. Notice of this order was given to Messrs. Blackwood, Blackwood & Co.'s attorneys on the same day by the attorney for Upendra Mohan Chowdhury, and the attorney requested them not to proceed further with the execution proceedings.

The sale of the premises was ultimately fixed by the Sheriff for the 16th March, this was brought to the

notice of the Official Assignee on the 15th March and he thereupon wrote to the Sheriff informing him of the order of the 23rd February and requesting him to stay the sale, and a copy of the letter was sent to Messrs. Blackwood, Blackwood & Co's. attorneys. The sale ultimately proceeded and the premises were sold. Messrs. Blackwood, Blackwood & Co. contend that the order of the 23rd February did not affect their right to proceed with the sale and to be paid the amount of their decree and costs out of the sale-proceeds; the Official Assignee, however, contends that, inasmuch as the premises had not been brought to sale prior to the order of the 23rd February, Messrs. Blackwood, Blackwood & Co. are not entitled to the benefit of the execution against him.

Section 109 of the Presidency Towns Insolvency Act provides: (1) "Upon an order being made for the administration of a deceased debtor's estate under section 108, the property of the debtor shall vest in the Official Assignee of the Court, and he shall forthwith proceed to realise and distribute the same in accordance with the provisions of this Act. (2) With the modification hereinafter mentioned all the provisions of Part III, relating to the administration of the property of an insolvent, shall, so far as the same are applicable, apply to the case of such administration order in like manner as to an order of adjudication under this Act."

The corresponding section of the English Bankruptcy Act, 1914, is section 130 (4) & (5), this section and these sub-sections corresponding to section 125 (5) & (6) of the English Bankruptcy Act, 1883.

Part III of the Presidency Towns Insolvency Act includes section 53 (1), which is as follows:—"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit

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of the execution against the Official Assignee, except in respect of assets realised in the course of the execution by sale or otherwise before the date of the order of adjudication and before he had notice of the presentation of any insolvency petition by or against the debtor."

The corresponding section of the English Act of 1914 is section 40, and of the Act of 1883, section 45. The English Courts have held that an order for administration of the estate of a deceased debtor under section 125 of the Bankruptcy Act, 1883, is not equivalent to a receiving order for the purposes of section 45 of that Act so as to disentitle an execution creditor of the deceased debtor to retain the benefit of his execution against the trustee of the debtor's estate in cases in which he has not completed the execution before the date of the administration order: see *Hasluck v. Clark* (1). The learned Judges point out that section 125 (section 108 of our Act) applies to the mode of administration and not to the subject-matter to be administered, and that it dealt with the deceased debtor's estate and nothing else, and Chitty L. J. points out that the question is not whether the property in the goods passed to the trustee under the administration order, but whether they passed free from the right of the execution creditor. *Hasluck v. Clark* (1) is considered in *Johnson v. Pickering* (2) and Fletcher Moulton L. J., states "I am satisfied that the effect of the decision in *Hasluck v. Clark* (1) is that the property which vests under the administration order in the trustee and is to be administered for the benefit of the creditors of the deceased, is the property of the deceased subject to any liabilities and rights which attached to it in his hands." In that case the decision

(1) [1898] 2 Q. B. 28 ;

(2) [1908] 1 K. B. 1, 9.

[1899] 1 Q. B. 699, 706.

was against the execution creditor because under the circumstances the Court held there had been no seizure, and that, therefore, no charge or lien had attached. In *Hasluck v. Clark* (1), the goods had been seized under a writ of *fi. fa.*, and although under such seizure the property in the goods remains in the execution debtor until sale, yet after seizure and before sale the execution creditor is, as regards these goods, in the position of a secured creditor and has a legal right as against the execution debtor, the owner of the goods, to have the goods sold and to be paid out of the proceeds of sale [*In re Clarke* (2), *Ex parte Williams* *In re Davis* (3), *Slater v. Pinder* (4)], and accordingly under an administration order made under section 130 (formerly section 125) of the English Bankruptcy Act, 1914, the goods pass to the trustee subject to these rights of the execution creditor. The question I have got to decide is whether an attachment in this country has the effect of giving any and similar rights to the attaching creditor. If it has, then *Hasluck v. Clark* (1) is an authority in favour of Messrs. Blackwood, Blackwood & Co., and the rights of the Official Assignee are subject to their rights in the sale-proceeds. If, however, an attachment in this country gives no right to the attaching creditor prior to sale, then *Hasluck v. Clark* (1) has no application. My decision is based upon the non-applicability of the provisions of section 53 (1) of the Presidency Towns Insolvency Act to an administration of the insolvent estate of a deceased person under the provisions of sections 108 and 109 of that Act, and to this extent I agree with the arguments addressed to me on behalf of Messrs. Blackwood, Blackwood & Co., but I am not prepared to assent to

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(2) [1898] 1 Ch. 336, 339.

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their arguments to the full extent, as I do not think that an attachment in this country creates any charge or lien upon the attached property such as attaches in England upon seizure under a writ of *fi. fa.* Attachment in this country only prevents alienation, it does not confer any title. *Peacock v. Madan Gopal* (1), *Raghunath Das v. Sundar Das Khetry* (2). The result is that the principles upon which *Hasluck v. Clark* (3) was decided, have no application here, and upon the making of the administration order the property vested in the Official Assignee, and Messrs. Blackwood, Blackwood & Co. has no rights therein and are relegated to the same position as the other creditors, that is to say, the sale-proceeds are distributable rateably between them and the other creditors. I declare that the Official Assignee is entitled to the sale-proceeds of the one-fourth undivided share of the premises No. 58-1, Wellington Street, sold in Suit No. 694 of 1916, in the hands of the Sheriff, in priority to Messrs. Blackwood, Blackwood & Co. Suit No. 694 of 1916 is not before me and I can, therefore, in view of the order in that suit, make no order upon this application for payment by the Sheriff to the Official Assignee of the sale-proceeds of the one-fourth undivided share.

A. K. R.

Attorney for the Official Assignee: *Jyotindra Nath Mitra.*

Attorneys for Messrs. Blackwood, Blackwood & Co.:
Pugh & Co.

(1) (1902) I. L. R. 29 Calc. 428, 431. (3) [1898] 2 Q. B. 28;
 (2) (1914) I. L. R. 42 Calc. 72, 80. [1899] 1 Q. B. 699.

FULL BENCH.

Before Sanderson C. J., Woolf, Mookerjee, Fletcher and Richardson JJ.

AMRITA LAL BOSE

v.

CORPORATION OF CALCUTTA.*

1917

June 15.

*Theatrical Performance—Keeping open a theatre after prescribed hour—
Joint proprietors, liability of—Penalty for offence or on offender—
Calcutta Municipal Act (Beng. III of 1899), ss. 559(52), 561—Bye-
laws 83 and 85—Validity of bye-law 85.*

Bye-law 85 framed under s. 559 (52) of the Calcutta Municipal Act (Beng. III of 1899) is not *ultra vires* by reason of s. 561 thereof, and each of the joint proprietors of a theatre is liable to a fine to the extent of Rs. 20 for keeping it open after 1 A.M., in contravention of bye-law 83.

Amrita Lal Bose v. Corporation of Calcutta (1) overruled.

Reg. v. Shordar Ghenar (2) distinguished.

Ree v. Clark (3), *Queen v. Littlechild* (4) referred to.

Per MOOKERJEE J. As a general principle of criminal law, all who participate in the commission of an offence are severally responsible, as though the offence had been committed by each of them acting alone; consequently each must be separately punished.

REFERENCE to Full Bench by Teunon and Newbould JJ.

The three petitioners, Amrita Lal Bose, Hari Prosad Bose and Dasu Charan Neogi, were joint proprietors and managers in different capacities of the "*Star Theatre*" in Cornwallis Street in the town of Calcutta. It appeared that on the 3rd September 1916, the theatre had been kept open beyond 1 A.M., and accordingly a complaint was filed against the three petitioners under bye-laws 83 and 85 framed under

* Reference to Full Bench in Criminal Revision Nos. 13 to 18 of 1917.

(1) (1917) 21 C. W. N. 1009.

(3) (1777) 2 Cowp. 610.

(2) (1870) 7 Bom. H. C. R. 39.

(4) (1871) L. R. 6 Q. B. 293.

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s. 559 (52) of the Calcutta Municipal Act. [The bye-laws are fully set out in the judgments.] On the 24th November, one of them, Hari Prosad, appeared before the Municipal Magistrate and pleaded guilty on behalf of all, whereupon he was fined Rs. 20 and the other two Rs. 10 each. They moved the High Court and obtained a Rule from Teunon and Beachcroft JJ., on the 1st December 1916, which was served on the Municipal Magistrate on the next day and was ultimately numbered *Cr. Rev. 1215 of 1916* [*Amrita Lal Bose v. Corporation of Calcutta* (1)].

In the meantime six other prosecutions were instituted against the same persons for similar offences committed on the 2nd, 5th, 6th, 9th, 12th and 13th November. They were tried on the 8th December, and convicted and sentenced in each case to separate fines of Rs. 20. They moved the High Court, and six Rules (*Cr. Rev. 13 to 18 of 1917*) were issued on the 2nd January 1917.

The first Rule came on for hearing, on the 18th January 1917, before Teunon and Chaudhuri JJ., under the title of *Amrita Lal Bose v. Corporation of Calcutta* (1). Their Lordships having differed, the case was referred, under s. 429 of the Criminal Procedure Code, to Chitty J. who, by his judgment, dated the 19th February, held, in agreement with Chaudhuri J., that a fine in excess of Rs. 20 in the aggregate was illegal.

The other Rules were heard by Teunon and Newbould JJ. Their Lordships having disagreed with the view of Chitty J., referred the case to a Full Bench in the following terms :

TEUNON J. These six Rules were issued at the instance of three petitioners, Amrita Lal Bose, Hari Prosad Bose and Dasu Charan Neogi. These three persons, it is admitted, are the co-sharer owners of a theatre known

as the Star Theatre situated in Cornwallis Street in the town of Calcutta, and each, it appears, takes an active part in the management thereof.

On the 2nd, 5th, 6th, 9th, 12th and 13th November the performance at this theatre was continued beyond the hour of 1 A.M. Six prosecutions were, therefore, instituted against the petitioners, who in each case were convicted on admissions made on behalf of all by their authorised agent, and sentenced each to pay a fine of Rs. 20. In each case an application was made to this Court on the 2nd January 1917 and the six Rules now before us were issued calling upon the Municipal Magistrate and the Chairman of the Corporation to show cause why in each case the sentences complained of should not be modified.

By section 559 of the Calcutta Municipal Act, 1899, clause (52), it is provided that the General Committee may make bye-laws for the regulation of theatres and other places of public resort, recreation or amusement.

In section 561 it is next enacted that in making a bye-law under section 559, the General Committee may provide that a breach of it shall be punishable with fine which may extend to Rs. 20. Of the bye-laws made by the General Committee under section 559 (52), the 83rd provides, with a certain exception which has no application here, that no performance shall be continued later than 1 A.M. The penalty is to be found in the 85th bye-law which says "Every person guilty of a breach of any of these bye-laws shall be punishable with fine which may extend to twenty rupees."

Thus in each of the six Rules the only question is whether, in view of the provisions of section 561 of the Act, the imposition of a fine of Rs. 20 on each of the three petitioners, *i.e.*, of a fine or fines exceeding in the aggregate Rs. 20, is authorised by law.

This same question, I may now observe, arose in Criminal Revision No. 1215 of 1916 [*Amrita Lal Bose v. Corporation of Calcutta* (1)]. In that case the conviction was in respect of an offence committed by the same three petitioners on the 3rd of September 1916. The Rule then issued at their instance was obtained on the 1st December, and eventually came on for hearing on the 18th January. The Judges (Chaudhuri J. and myself) having differed in opinion, the case was referred to Chitty J. who in agreement with Chaudhuri, J., delivered judgment, on the 19th of February, holding that a fine or fines exceeding Rs. 20 in the aggregate were not permissible. When on the 13th March the present Rules came on for hearing before the Bench as now constituted, learned counsel (Mr. K. N. Chaudhuri) appearing for the petitioners contended that we had no jurisdiction to hear them. This contention appeared to resolve itself into two branches, the first being that we were bound by the decision of Chitty and Chaudhuri JJ., in *Amrita Lal Bose v. Corporation of Calcutta* (1).

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That, however, is not so. On the 18th January there was but one Rule or case (No. 1215), before the Court. No reference was made at the hearing to these later Rules, and in fact at that time the returns to these Rules and the Explanation or statement which, under Section 441 of the Code, the Magistrate is entitled to submit, had not been received. No doubt it was open to the petitioners, or to learned Counsel appearing on their behalf, to apply that the hearing of the first Rule should be postponed until the later Rules could be heard with it. But this course was not taken and the only case heard on the 18th January, and decided by Chitty and Chaudhuri JJ., on the 19th of February, was Criminal Revision No. 1215 of 1916 [*Amrita Lal Bose v. Corporation of Calcutta* (1)]. It cannot be questioned that any Divisional Bench of this Court may differ from any other Divisional Bench on a question of law and in these cases, the question involved being one of great public importance, we both felt that we ought not to follow the previous decision without further examination of the grounds on which it was based.

It was next contended that, as one of the Judges composing the present Bench (i.e., myself) was one of the Judges who had heard *Criminal Revision No. 1215* on the 18th January and had then expressed an opinion contrary to the decision ultimately arrived at, the Bench so constituted had no jurisdiction to hear the present Rules. This appears to be a novel doctrine which if given effect to would dislocate the business of this Court. An examination of the constitution of the Full Benches formed from time to time will show that an expression of opinion by a Judge on a question of law does not debar him from hearing and dealing with the same question on a subsequent occasion. I need refer only to the recent Full Bench which decided *Criminal Revision No. 848 of 1916* on the 4th December last [*Charu Chandra Majumdar v. Emperor* (2)], and to the Full Bench which on the 20th December 1895 [*Queen-Empress v. Sri Churn Churno* (3)] overruled the decision of Petheram C. J., and Beverley J., in the case of *Prosonno Kumar Patra v. Uday Sant* (4) decided on the 30th April of that same year.

No doubt, if learned Counsel appearing on behalf of the petitioners had felt genuinely embarrassed in his argument by the composition of the Bench, it was open to him to represent this to the Court, and to apply with the courtesy due to the Bench that we should move his Lordship, the Chief Justice, to transfer these cases to some other Bench. To such an application so made we would have lent a ready ear. But this course was not taken, and to a claim advanced as of right, advanced too with unbecoming heat and discourtesy, we could not accede.

(1) (1917) 21. C. W. N. 1009.

(3) (1895) I. L. R. 22 Calc. 1017.

(2) (1916) I. L. R. 44 Calc. 595.

(4) (1895) I. L. R. 22 Calc. 669.

Having made his observations on the question of jurisdiction, learned Counsel next intimated that he did not propose to argue the matter further, and on the merits, therefore, we have not had the benefit of his assistance.

We may now return to the question of law involved in the present Rules. Mr. Mammatha Nath Mukherjee, to whom we are much indebted, appearing for the Corporation, has placed before us all the authorities on which, so far as can be gathered, the petitioners rely. The following English cases have been referred to : *Rex v. Clark* (1), *Reg. v. Dean* (2), *Queen v. Littlechild* (3), also *Crepps v. Durdin* (4). The only Indian authority cited in this connection was the case of *Reg. v. Showdar Ghenar* (5); but my attention has since been drawn to the case of *Re Gungadhur Sahoo* (6). In *Reg. v. Showdar Ghenar* (5), decided in 1870, Westropp, C. J. elaborately discussed, the earlier English cases, and following apparently the case, of *Queen v. M'Naghten* (7), *King v. Bleasdale* (8), *Hardynmann v. Whitaker* (9) and *Patridge v. Naylor* (10) held that on the language of Regulation XXI of 1827, section 4, only one forfeiture of double the amount of the duty *plus* double the value of the opium in question had been incurred. It is not for me to question the decision of a Full Bench of the Bombay High Court on a Bombay Regulation, but it may be noticed that in the case of *Reg. v. Fakhatchand* (11) an earlier Full Bench consisting of six Judges of the same Court had taken the contrary view. For the present purpose it is sufficient to observe that the Regulation under consideration in both the Bombay cases above referred to was of a date long prior to the enactment of the Indian Penal Code in 1860. Similarly the case of *Re Gungadhur Sahoo* (6) was decided on the language of section 17 of Bengal Act VII of 1864, while the definition of "offence" (section 40 of the Code) was not extended to acts punishable under local or special laws until 1870 by Act XXVII of that year. Moreover, the decision in *Re Gungadhur Sahoo* (6) appears to have proceeded in part on the fact that the two persons convicted in each of the two cases then in question were master and servant, and on the view that the custody of the servant (whom the Court acquitted) was the possession of the master.

In the view I take, the English cases, in so far as they discuss the distinction between offences single (or joint and indivisible) in their nature and offences several in their nature are of no authority here in India.

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| (1) (1777) 2 Cowp. 610. | (6) (1874) 22 W. R. Cr. 9. |
| (2) (1843) 12 M. & W. 39. | (7) (1845) 9 Ir. L. R. 93. |
| (3) (1871) L. R. 6 Q. B. 293. | (8) (1792) 4 T. R. 809. |
| (4) (1777) 2 Cowp. 640. | (9) (1749) 2 East 573. |
| (5) (1870) 7 Bom. H. C. R. 39. | (10) (1596) Noy 52. |
| (11) (1863) 1 Bom. H. C. R. 50. | |

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But the general rule, and in my opinion the only general rule laid down in these cases, and also in the case of *Reg. v. Showdar Ghenar* (1), is that in each case the question must be determined by the language of the particular Statute. That rule is equally applicable in England and in India.

Here, therefore, we have to construe section 56, of the Calcutta Municipal Act, and that Act is again to be read in the light of the Bengal General Clauses Act (I of 1899) and also in the light of certain sections of the Indian Penal Code which, as is well known, was intended to replace the pre-existing Criminal Law.

It cannot, we think, be questioned that the breach of a bye-law made under the provisions of the Calcutta Municipal Act is a "thing punishable" under a special or local law. To things so punishable, section 40 of the Code, as amended by Act XXVII of 1870, extends the provisions, *inter alia*, of section 109 of the Code. Similarly section 3, clause (1) of the Bengal General Clauses Act, we may observe, provides that, unless there is anything repugnant in the subject or context, the word "abet" shall have the same meaning as in the Indian Penal Code. Section 109 of that Code provides in substance that whoever abets any offence shall be punished with the punishment provided for the offence. Persons who in concert commit an offence are treated each as having abetted the other. That is the case here. The three petitioners, the co-sharer owners and managers of this theatre, it has been found, combined to continue the performance on the nights in question beyond the closing hour. They acted in concert, and there is no suggestion that in keeping the theatre open anyone or two of them acted in defiance of the wishes of the others.

In my opinion, therefore, having regard to the provisions of sections 40 and 109 of the Indian Penal Code, they are individually liable to the full penalty provided for the offence.

Apart, however, from the sections of the Indian Penal Code which, in my opinion, are applicable and, therefore, must be applied, on the language of the section itself I come to the same conclusion. The breach of a bye-law is an offence. The section (section 561) provides in effect that this offence shall be punishable with fine which may extend to twenty rupees. There is nothing unique in this language. In section 40 of the Indian Penal Code an "offence" is spoken of as a "thing made punishable by" or "punishable under the Code or a special or local law" as the case may be. Similarly, sections 64 and 67 speak of "offences punishable with fine" or "imprisonment," and so forth, but when we come to the operative or punitive sections punishment for each individual offender is provided. In this connection the Criminal Procedure Code and also some other special laws may be referred to. I need not, however, elaborate this argument.

In my opinion when the section provides that the offence consisting in the breach of a bye-law shall be punishable with fine which may extend to rupees twenty, it means and provides that such offence in every individual offender guilty thereof is punishable to that extent.

The last contention put forward in the application of the petitioners is that they, being joint owners of the theatre in question, are "one person" for the purposes and within the meaning of the 83rd and 85th bye-laws.

This contention appears to be based on the Bengal General Clauses Act, section 3, clause (32), which says that, unless there is anything repugnant in the subject or context, "person" shall include any company or association or body of individuals whether incorporated or not. On this definition it may be that where rights are specially conferred or obligations specifically imposed upon the "owners" of premises, these three co-owners are for such purposes to be considered as one. But here the case appears to me to be different. A breach of this bye-law, which consists in the continuance of a performance beyond a stated hour, may, I venture to think, be committed by the individual actor, the manager, the proprietor and by all aiding and abetting them in the continuance thereof. Further, under the definition on which reliance is placed, three persons can be treated as one only when there is no repugnancy in the subject or context. Here and in Indian Penal Legislation in general, in my opinion, there is such repugnancy, and in further support of this view I should refer to section 26 of the Bengal General Clauses Act which provides, *inter alia*, that in the absence of express provision to the contrary section 64 of the Indian Penal Code "shall apply" to all fines imposed under any Bengal Act. Section 64 of the Code provides that in every case of an offence punishable with fine only, it shall be competent to the Court to direct that in default of payment the offender shall suffer imprisonment. No doubt in the case of *Basanta Kumari Debi v. Corporation of Calcutta* (1), a Bench of this Court held that in the case of the bye-law then before them imprisonment could not be imposed. But with all respect to the learned Judges who so decided, I am unable to agree in the view which then found favour. Neither in that case nor in this does the Act or bye-law contain any express provision to the contrary, and I am, therefore, of opinion that that case was wrongly decided, and in this connection I may refer to the case reported in *In re Lakmia* (2). Further, the case of *Basanta Kumari Debi v. Corporation of Calcutta* (1) may be distinguished inasmuch as the Court was there dealing with a continuing breach.

The liability of the offenders to imprisonment would seem to negative the contention that three offenders can be held to constitute one "person."

(1) (1911) 15 C. W. N. 906.

(2) (1893) I. L. R. 18 Bom. 400.

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To sum up, I am of opinion that when section 561 of the Calcutta Municipal Act provides that a breach of a bye-law shall or may be punishable with fines which may extend to twenty rupees, it provides that the offence shall be so punishable in each and every individual offender, that bye-law 85 is, therefore, not *ultra vires*, and that three offenders cannot be considered to be one person within the meaning and for the purposes of the section and of the bye-laws now in question.

I am, therefore, of opinion that the present Rules should be discharged.

NEWBOULD J. The question that arises in these Rules is whether the Magistrate had power to impose on each of the three petitioners the full penalty provided by law for the breach of a bye-law of the Calcutta Municipality. The same question arose recently, when the same petitioners were convicted of a breach of the same bye-law, and it was held by Chitty and Chaudhuri JJ., Teunon J. dissenting, that the total amount of the fines imposed on the petitioners could not exceed the sum of Rs. 20, the full penalty provided for the offence. When these Rules came up for hearing, the learned Counsel for the petitioners contended that the previous decision was binding on us, and we must make these Rules absolute and had no jurisdiction to do otherwise. He refused to assist us by arguing in support of these Rules or in reply to the arguments of the learned Pleader for the respondent in support of our having jurisdiction. On this point I think it unnecessary to add anything to the remarks of my learned brother with which I entirely agree

The offence of which the petitioners were convicted on their plea of guilty was a breach of bye-law 83 duly made by the General Committee of the Calcutta Municipality, under section 559 (52) of the Calcutta Municipal Act, III (B.C.) of 1889. This bye-law is as follows :—

“Hour of closing Theatres. No performance shall be continued later than 1 A.M., unless with the particular permission of the Chairman for any particular occasion.” The penalty clause of these bye-laws made under section 561 of the same Act is to the following effect :—“Every person guilty of a breach of any of these bye-laws shall be punishable (a) with fine which may extend to twenty rupees . . .” It is unnecessary to quote the remainder of the clause which relates to continuing breaches. To me it seems perfectly clear that under this penalty clause each of the petitioners who has committed a breach of bye-law 83 is punishable with a fine of Rs. 20. I will consider later the question whether this penalty clause is *ultra vires*. Assuming that it is not I find myself unable to agree with my learned brother Chitty J., that the *dictum* of Lord Mansfield in *Rex v. Clark* (1)

supports the contention of the petitioners in the present case. This case and other English cases on the point are discussed by Westropp C. J. in *Reg. v. Showdar Ghenar* (1). He states "the English decisions would appear to show (i) that if the penalty be imposed by an Act of Legislature upon each person convicted even where the offence would in its nature be single, or (ii) if the quality of the offence be such that the guilt of one person may be distinct from that of the others—in either of these cases the penalties are several." Now in *Rex v. Clark* (2), Mr. Buller in support of the rule argued "only one penalty can be recovered:" for it is not said "that every person offending shall for every such offence forfeit", but "if any person or persons shall, etc., the party or parties shall for every such offence forfeit and lose £40." Lord Mansfield in his judgment did not discuss that argument but discharged the rule on the ground the offence in that case was in its nature several and not single. There is nothing in his judgment to contradict the first portion of Westropp C. J.'s concise statement of the effect of the English decisions, namely, that even where the offence would in its own nature be single, the penalties are several if the penalty be imposed by an Act of the Legislature on each person convicted. I have considered the English cases referred to in *Reg. v. Showdar Ghenar* (1), and cannot find any of them contradict the rule that where the enactment makes "every person" offending liable to the penalty, separate penalties can be opposed on each person. The only case that seems at all to support the petitioners' contention is *Partridge v. Emson* (3), or *Partridge v. Naylor* (4) in which in spite of the words of the Act making "every person offending" liable to forfeit £5, it was held that but one £5 shall be forfeited, in an action against three persons. But, as pointed out by Westropp C. J., at pages 46 and 47 of the report abovementioned, this is a very peculiar case and can be distinguished on the ground that this was a civil action by a private person and the penalty was of the nature of compensation rather than fine.

The decision in *Reg. v. Showdar Ghenar* (1) itself does not help the petitioners. In that case it was held that only one penalty was leviable because the words of the enactment infringed (Regulation XXI of 1827, section 4) were not "every person shall forfeit", but "any person or persons" (page 45). It was also pointed out in the judgment of Couch C. J. (page 40) with which Westropp C. J. concurred that the penalty not being a fixed sum but varying according to the quantity of opium kept or concealed is more consistent with its being a single one than with there being several penalties. I draw special attention to this remark because in the only case of this Court which I have been able to

(1) (1870) 7 Bom. H. C. R. 39.

(3) (1596) Noy 62.

(2) (1777) 2 Cowp. 610.

(4) (1596) Noy 52.

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find containing a reference to *Reg. v. Shewdar Ghenar* (1), namely *Re Gungadhur Sahoo* (2), that decision was approved on the ground that in that case also the sum in which the parties were liable to be fined was not a fixed one, being liable to vary according to the quantity of contraband salt found in their possession.

I now come to the question whether this penalty clause of the bye-laws is *ultra vires*. The section of the Calcutta Municipal Act under which it was made is section 561, which, excluding the portion relating to a continuing breach, runs as follows :—"In making a bye-law under section 559 the General Committee may provide that a breach of it shall be punishable (a) with a fine which may extend to twenty rupees. . ."

I cannot find in these words any restriction preventing the General Committee from providing, as they have done, that every person guilty of the breach of a bye-law shall be punishable with a fine which may extend to twenty rupees. Whatever may be the law in England, it appears that the Indian Legislature has made no distinction between the punishment of an offence and the punishment of an offender. The expression punishment of an offence must connote the punishment of an offender. One cannot hang a murder or imprison a theft. The Indian Penal Code refers indiscriminately to offenders being punishable and offences being punishable. For example see sections 59 and 60 for the former expression and sections 62 and 64 for the latter. The words "offence punishable" are a convenient and compact expression for a longer phrase such as "an offence for which a person who has committed the same is punishable." Another example of the use of the expression "offence punishable" being used in this sense may be found in the Bengal Excise Act, 1909. Section 46 of that Act provides for the punishment of persons, and section 56 refers to "any offence punishable under section 56." Also in section 40 of the Indian Penal Code it is stated that "the word 'offence' denotes a thing made punishable by the Code." But all the operative sections of the Code by which offences are made punishable commence with the word "whoever", and expressly provide for the punishment of the person committing the offence. There is nothing in the Calcutta Municipal Act to suggest that the Legislature, when it empowered the General Committee "to make a breach punishable", used the words in any other sense than that in which the words "offence punishable" are used in the Penal Code. The words used are capable of easy interpretation and it is, therefore, unnecessary to consider the intention of the Legislature. If it were, I should hold that it was highly improbable that they intended to prevent the imposition of more than one sum of Rs. 20 for a breach of this bye-law irrespective of the number of persons who committed the

(1) (1870) 7 Bom. H. C. R. 39.

(2) (1874) 22 W. R. Cr. 9.

breach. The number of convictions of the present petitioners shows that a single fine of this amount is insufficient as a deterrent. Unless more persons than one can be separately punished for these offences it obviously pays the owners of any popular theatre to treat the bye-law with contempt. For these reasons I am of the opinion that the penalty clause under which the petitioners have been separately convicted is *intra vires* of section 561 of the Calcutta Municipal Act.

The only other point to be considered is whether the three petitioners constitute a single person and are liable to a single fine on this account. It appears from the evidence of their agent on whose admission they were convicted that, as well as being partners, they each take an active part in the management of the theatre. The first petitioner is the dramatic director, the second is the business manager and the third sells tickets. On this I would hold that they have been convicted for their individual acts and not as a body of individuals forming a "person" within the definition of that word given in clause (32) of section 3 of the Bengal General Clauses Act I (B. C.) of 1889. But in any case that definition cannot apply in the present Act since the subject of a penal clause is repugnant to such an interpretation. I am unable to agree with the decision of a Bench of this Court in *Basanta Kumari Debi v. Corporation of Calcutta* (1), that imprisonment cannot be enforced under section 64 of the Indian Penal Code for non-payment of a fine for an offence under the Calcutta Municipal Act. Section 40 of the Indian Penal Code and section 26 of the Bengal General Clauses Act, seem to me to clearly apply. But this case can be distinguished on the ground that the Judges deciding it only dealt with the question of a daily fine for a continuing breach and expressly held it unnecessary to discuss the effect of the General Clauses Act and made no reference to section 40 of the Indian Penal Code. Since these offences are punishable with imprisonment in default of payment of fine, the three petitioners cannot be treated as a single person as the imprisonment could not be apportioned.

But for the recent decision in the similar case referred to at the commencement of my judgment, I would discharge these Rules, but as that cannot be done, the case must be referred for decision to a Full Bench.

On the 30th March 1917, TEUNON AND NEWBOULD JJ. passed the following order:—

"For the reasons given in our separately recorded opinions, we are agreed that the six cases before us should be referred, under Part II, Chapter V, Rule V of our Rules, to a Full Bench for such orders as to such Bench may seem fit.

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The question for the determination of the Full Bench we state as follows :—

Was the case of *Amrita Lal Bose v. Corporation of Calcutta* (1) (being Criminal Revision No. 1215 of 1916), rightly decided ? ”

Mr. Eardley Norton (with him *Mr. K. N. Chaudhuri* and *Babu Hemendra Nath Sen*, for the petitioners. The question is whether the fine is imposable for the offence or on the offender. It depends on the construction of ss. 559 (52) and 561 of the Calcutta Municipal Act and bye-laws 83, 85 framed thereunder. The breach of the bye-law was complete at 1 A.M., independently of the offender, and is different from an offence like an assault by different persons : there is no analogy between a breach of bye-law 85 and an assault by several persons. There is a distinction between penalties leviable from different persons and from one : *Reg. v. Showdur Ghonar* (2), *Queen v. Littlechild* (3), *Rex v. Clark* (4). The offence under bye-law 85 is single in nature, and only one penalty can be awarded. It is the intention of bye-laws 83, 85 to make the keeping open of a theatre after 1 A.M. a single offence. The word “person” in bye-law 85 must be read with the definition in s. 3 (32) of the Bengal General Clauses Act, (B. C.), I. of 1899. If the intention of the bye-law is to punish persons individually, it is *ultra vires* of s. 561. The referring Judges were wrong in reading the abetment sections of the Penal Code into the Municipal Act and the bye-laws.

The Offg. Advocate-General (Mr. B. C. Mitter) (with him *Babu Manmatha Nath Mookerjee*), for the Corporation. Under bye-law 85 each person is severally liable. The difficulty arises from s. 3 (32) of the Bengal General Clauses Act, but the word there is “include” not “means”. It must be read with s. 26. If “person” means only a collective body, it would be difficult to

(1) (1917) 21 C. W. N. 1009.

(3) (1871) L. R. 6 Q. B. 293, 295.

(2) (1870) 7 Bom. H. C. R. 39.

(4) (1777) 2 Cowp. 610.

allocate the imprisonment. As to bye-law 85 being *ultra vires*, see ss. 559 (52), 561. My contention that the offence under it is individual is supported by s. 40 of the Penal Code and s. 26 of the Bengal General Clauses Act. The distinction drawn in *Rex v. Clark* (1) is not applicable to India. In the case of the killing of a hare by different persons each would be liable for mischief in this country. The distinction between punishment of the offence and the offender is not sound. In ss. 177 and 195 of the Criminal Procedure Code the reference is to an "offence."

Mr. Norton, in reply. As to apportionment of the fine, I submit it can be realized in full from each.

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SANDERSON C.J. This matter refers to six Criminal Revision Cases, Nos. 13, 14, 15, 16, 17 and 18 of 1917.

The question which has been referred to the Full Bench is as follows:—"Was the case of *Amrita Lal Bose v. Corporation of Calcutta* (2) (being Criminal Revision No. 1215 of 1916) rightly decided?"

That Revision case was heard by Teunon and Chaudhuri JJ., who were divided in opinion and the case was, therefore, under section 429 of the Criminal Procedure Code, laid before Chitty J., who after hearing the case gave his opinion agreeing with that expressed by Chaudhuri J. Consequently, the judgment was in accordance with Chitty J.'s opinion and the question we have to consider is whether that decision was correct.

The matter arose in the following manner. Three persons, Amrita Lal Bose, Hari Prosad Bose and Dasu Charan Neogi, are joint proprietors of the "*Star Theatre*," Cornwallis Street, Calcutta. A complaint was laid against them by the Corporation of Calcutta, alleging that on the 3rd September 1916, in breach of

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(2) (1917) 21 C. W. N. 1009.

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clause 83 of the bye-laws made under section 559 (52) of Calcutta Municipal Act of 1899, they had continued a performance at the "*Star Theatre*" later than 1 A.M. On the 24th November 1916 one of the petitioners appeared before the Magistrate and admitted the offence charged, whereupon the Magistrate fined Amrita Lal Bose Rs. 20 and the other two petitioners Rs. 10 each, *i.e.*, Rs. 40 in all. The three individuals concerned petitioned the High Court and a Rule was granted by Teunon and Beachcroft JJ., on the 1st December 1916, in Revision Case 1215 of 1916 [*Amrita Lal Bose v. Corporation of Calcutta* (1)], calling upon the Magistrate to shew cause why the order of 24th November 1916 should not be set aside.

On 18th January 1917, the Rule was argued before Teunon and Chaudhuri JJ., and as already stated the learned Judges differed in opinion, Teunon J. being in favour of discharging the Rule, and Chaudhuri J. being of opinion that the Rule should be made absolute. When the matter was referred to Chitty J., he agreed with Chaudhuri J. Consequently, the Rule was made absolute: the conviction of the three petitioners was upheld but the penalty imposed was limited to Rs. 20, and it was ordered that it should be apportioned equally between the three petitioners. In the meantime prosecutions had been instituted with reference to six other cases against the same three persons, the allegation being that they had continued the performance at the theatre after 1 A.M. on the 2nd, 5th, 6th, 9th, 12th, and 13th November 1916. They were convicted in each case and fined Rs. 20 each. In each case rules were issued by the High Court. On the hearing by Teunon and Newbould JJ., of these rules the same points were involved as on the hearing of *Amrita Lal Bose v. Corporation of Calcutta* (1) and

these two learned Judges, disagreeing with the decision of Chitty J. in that case, have referred the matter to the Full Bench.

The question is whether the Magistrate in *Amrita Lal Bose v. Corporation of Calcutta* (1) had power to impose a fine exceeding the sum of Rs. 20 in respect of the offence alleged; it was contended that the Magistrate in imposing upon the joint proprietors the three fines, the total of which exceeded Rs. 20, had acted in contravention of the law.

The determination of this question depends upon the Calcutta Municipal Act, 1899, sections 559 (clause 52) and 561, and upon two bye-laws made by the General Committee under section 559 (52), *viz.*, bye-laws 83 and 85. Section 559 (52) of the Calcutta Municipal Act, 1899, provides that the General Committee may make bye-laws for the regulation of theatres and other places of public resort, recreation and amusement: and section 561 provides that "In making a bye-law under section 559 the General Committee may provide that a breach of it shall be punishable (a) with fine which may extend to Rs. 20, and in the case of a continuing breach, with fine which may extend to Rs. 10, for every day during which the breach continues after conviction for the first breach. . ."

Certain bye-laws were made under section 559 (52) of the Act for the regulation of theatres, and one of them, *viz.*, bye-law 83, provides that "no performance shall be continued later than 1 A.M. unless with the special permission of the Chairman for any particular occasion," and 85 provides that "every person guilty of a breach of any of these bye-laws shall be punishable—(a) with fine which may extend to Rs. 20, and in case of a continuing breach with fine which may extend to Rs. 10 for every day during which the

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breach continues after conviction for the first breach

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The main contentions urged by learned counsel on behalf of the petitioners were (i) that the offence was, in its nature, single, and that the penalty was also single, in other words, that although all the petitioners could be convicted of the offence the Magistrate could not impose a fine of more than Rs. 20 in respect thereof. (ii) That if bye-law 85 enabled the Magistrate to impose a fine upon each person convicted of the offence, so that the total of the fine exceeded Rs. 20, the bye-law was *ultra vires*. (iii) That it was not necessary to hold that the bye-law was *ultra vires* because of the definition of the word “person” in the Bengal Clauses Act, 1899, section 3 (32), which provides that, unless there is anything repugnant in the subject or context, “person” shall include “any company or association or body of individuals whether incorporated or not”, and that consequently the word “person” would include the three petitioners as joint proprietors of the theatre and that they could properly be regarded as a “person” for the purpose of bye-law 85.

We were referred to several cases as to the construction to be placed upon statutes dealing with the imposition of penalties for the breach of an offence, but there can be no doubt as to the principle of construction which should be applied to this matter. It is as follows :—

“ If either the penalty be imposed by the Act upon each person convicted even where the offence would in its own nature be single, or if the quality of the offence be such that the guilt of one person may be distinct from that of the others—in either of these cases the penalties are several”: see *Queen v. Littlechild* (1).

In each case the question must be determined by the language of the particular statute.

In this case we have to consider not only the Act but also the bye-laws made under the Act. It was urged that the offence was single in its nature even when committed by three persons: of this I am not satisfied, but I do not think it is necessary to express any definite opinion thereon, for on a true interpretation of the bye-laws 83 and 85, I think there is no doubt that it was the intention of those framing the bye-laws to impose upon each person convicted of a breach of the bye-law 83 a fine to the extent mentioned in bye-law 85. I think the words used in bye-law 85 make that clear.

In my judgment, this interpretation of the bye-law is not inconsistent with the definition of the word "person" in the Bengal Clauses Act, 1899, section 3 (32). The three petitioners are alleged to be joint proprietors of the *'Star Theatre.'* With great deference to the learned Judges who have held the contrary view, I have considerable doubt whether the petitioners, merely because they are carrying on the theatre jointly, could be said to come within any of the expressions mentioned in the section, *viz.*, "any company or association or body of individuals, whether incorporated or not." Even if they do, the section is not an exhaustive definition of the word "person", but only provides that the word "person" shall *include* certain bodies of individuals, which without such definition might not be affected by the provisions of the Act in question; and, in my judgment, it does not prevent the bye-law 85 from applying to the three petitioners, each of whom, according to the statement made by one of the petitioners, as recorded in the Magistrate's letter of explanation in *Amrita Lal Bose v. Corporation of Calcutta* (1), was in

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his individual capacity taking some part in the management of the theatre.

It is said, however, that if this is the correct interpretation of bye-law 85, it is *ultra vires* by reason of the provisions of section 561. This section, as already mentioned, provides, that in making a bye-law under section 559, the General Committee may provide that *a breach of it shall be punishable*, (a) with fine which may extend to Rs. 20, etc.

The question, therefore, is whether the terms of that section are such as to prevent the General Committee from making a bye-law which imposes a fine to the extent of Rs. 20, upon *each* person who is guilty of a breach of the bye-law in question. The expression in the Act, "the Committee may provide that a breach of it shall be punishable" with a fine which may extend to Rs. 20, obviously involves the punishment of an offender or offenders; but the incidence of the fine with reference to such offender or offenders was not dealt with in the Act itself, and I think the intention was to leave it to the General Committee to make bye-laws dealing with that matter.

In my judgment, therefore, bye-law 85 is not *ultra vires*, and by the express terms of that bye-law each of the petitioners was liable to be fined to the extent of Rs. 20 for the breach of bye-law 83.

I do not think that this case is covered by the decision in *Reg. v. Showdar Ghenar* (1). In the first place, that was not a case such as we have before us of a general provision in an Act with a power to a Municipal body to make bye-laws for the purpose of carrying out in detail the general provision, but the offence and punishment were dealt with in one Regulation which the Court had to construe. Secondly, as Couch C.J. pointed out at page 40, "the penalty not being a fixed

sum but varying according to the quantity of opium kept or concealed was more consistent with its being a single one than with there being several penalties.' In this case the penalty is a fixed sum. There might have been some analogy between the two cases, if, *exempli gratia*, instead of a fixed sum there had been a provision that the penalty should vary according to the amount of the takings at the performance of the theatre. Further, it seems to have been suggested by Westropp C.J., at page 45, that if the Regulation had contained words similar to those found in the bye-law now under consideration, *viz.*, "every person offending against this Regulation", the decision in that case might have been different.

In the case under consideration, the penalty of Rs. 20 was directed to be apportioned equally between the petitioners, although the Magistrate had fined one petitioner Rs. 20 and the other two Rs. 10 each. It has not been explained under what provision such an order of apportionment could be made, but if this could be done the anomalous result would occur that if a man committed a breach of the bye-law by himself, he would be liable to a fine of Rs. 20, but that if he and two others committed the breach, he would be liable for a third of that sum only.

For these reasons, in my judgment, the answer to the question addressed to us should be that *Amrita Lal Bose v. Corporation of Calcutta* (1) was not rightly decided. In my judgment, therefore, the Rule should be discharged in each of the abovementioned cases.

WOODROFFE J. I agree with the judgment about to be delivered by Mr. Justice Mookerjee.

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MOOKERJEE J. The question referred to the Full Bench for determination has been framed in the following terms :

“ Was the case of *Amrita Lal Bose v. Corporation of Calcutta* (1) (Criminal Revision 1215 of 1916) rightly decided ? ”

It may be observed at the outset that the reference is not strictly in accord with Rule 5 of Chapter V of the Rules of Court, which provides as follows :

“ If the question arises in any case coming before a Division Court, as a Court of Criminal Appeal, Reference or Revision, the Court referring the case shall state the point or points on which they differ from a decision of a former Division Court, and shall refer the case to a Full Bench for such orders as to such Bench may seem fit.”

Consequently, what has to be referred to the Full Bench is the entire case, and the point or points on which the referring Division Court differs from the decision of the former Division Court has also to be stated ; in other words, the question, that is, “ the point of law or usage having the force of law ” mentioned in rule 1, should also be formulated. In these circumstances it is necessary to specify the point of law involved in this Reference.

Section 559 of the Calcutta Municipal Act, 1899, authorises the General Committee, by clause 52, to make bye-laws for the regulation of theatres and other places of public resort, recreation or amusement. Section 561 next provides, in the following terms for the imposition of penalties for breaches of bye-laws :

“ In making a bye-law under section 559, the General Committee may provide that a breach of it shall be punishable

(a) with fine which may extend to twenty rupees, and, in the case of a continuing breach, with fine which may extend to ten rupees for every day during which the breach continues, after conviction for the first breach, or

(b) with fine which may extend to ten rupees for every day during which the breach continues after receipt of written notice from the Chairman to discontinue the breach."

The General Committee has framed bye-laws under section 559(52), which have been duly sanctioned by the Local Government and published in the *Calcutta Gazette*. Bye-law 83 is in the following terms:

"No performance shall be continued later than 1 A.M. unless with the special permission of the Chairman for any particular occasion."

Bye-law 85 is in the following terms:

"Every person guilty of a breach of any of these bye-laws shall be punishable

(a) with fine which may extend to twenty rupees, and in the case of a continuing breach, with fine which may extend to ten rupees for every day during which the breach continues after conviction for the first breach, or

(b) with fine which may extend to ten rupees for every day during which the breach continues after receipt of written notice from the Chairman to discontinue the breach."

In the case of *Amrita Lal Bose v. Corporation of Calcutta* (1), three persons, who were joint proprietors of the "*Star Theatre*", were found to have committed a breach of bye-law 83, inasmuch as the performance at the theatre was continued beyond the prescribed hour on the night of the 3rd September 1916. The Municipal Magistrate convicted the accused persons, and imposed a fine of twenty rupees upon one of them and of ten rupees upon each of the others. The legality of this sentence was called in question before this Court on the ground that it was not competent to the Magistrate to impose a fine of more than twenty rupees in the aggregate upon the three accused persons. This contention was upheld by Chitty and Chaudhuri JJ. (Teunon J., *contra*). According to the judgment of Chitty J., the penalty imposed was

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reduced from rupees forty to rupees twenty, to be apportioned equally among the three accused persons. There appears to have been other breaches of the bye-law in question at the same theatre on the 2nd, 5th, 6th, 9th, 12th and 13th November 1916. The joint proprietors were, thereupon, prosecuted and convicted as before, and as the cases were decided by the Magistrate before the pronouncement of the final decision by this Court in the case previously mentioned, he imposed a fine of twenty rupees upon each accused for each breach of the bye-law. These cases have been brought up to this Court for revision of the sentences as illegal and unauthorised by law. Teunon and Newbould JJ., who have heard these six Rules, have expressed their dissent from the view of the law adopted by Chitty and Chaudhuri JJ., and have referred the question for decision by a Full Bench. The question for determination by this Bench may, consequently, be formulated as follows:—

“When several persons have been jointly convicted of a breach of bye-law 83, are they jointly liable under bye-law 85 to pay a fine not exceeding twenty rupees, or, is each person so convicted liable to pay a fine which may extend to twenty rupees?”

The answer to this question depends upon the true construction of bye-law 85, read with section 561 of the Calcutta Municipal Act. Before we interpret section 561 whereon bye-law 85 is founded, we may usefully recall a fundamental principle which, as some of the cases in the books show, has not always been borne in mind.

The distinction between a tort and a crime, between a civil suit and a criminal proceeding, may be regarded as of an elementary character, and the same wrongful act sometimes gives rise to a civil as well as to a criminal liability. The purpose of the

civil suit is to compel the defendant to compensate the plaintiff for what he has unjustly suffered, while the object of the criminal proceeding is punishment and the cure of what may be called a public wrong. A crime is thus a wrong which the Government deems injurious to the public at large and punishes through a judicial proceeding instituted in its own name or on its behalf. The line of demarcation between a civil and a criminal proceeding may sometimes be difficult to draw, and judicial opinion has differed in individual instances as to the true effect of a statutory proceeding, whether it is in its nature civil or criminal, or, as is sometimes said, *quasi civil or quasi criminal*. Reference may be made in this connection to *Queen v. Chorley* (1) and *Queen v. Russell* (2), and it may be noted that the mere fact of a fine no more shows that an indictment is a criminal proceeding than the ancient fine in trespass. As pointed out in a *note* to *Queen v. Paget* (3), where it was ruled that an indictment for the obstruction of a highway, intended to effect the removal of a nuisance, is in substance a civil and not a criminal case, the distinction taken in the most ancient and approved authorities between a criminal and a civil proceeding is whether the real end or object of the proceeding is punishment or reparation [Mirror of Justices, Ch. XI, section 3: 1 Reeve's Hist. Eng. Law 32]. This fundamental distinction between a tort and a crime cannot be ignored or rejected, and leads inevitably to the position that while in a civil suit for damages, however numerous the wrong-doers, the plaintiff is to be compensated for his loss only once, in a criminal proceeding, where each wrong-doer is as guilty as though the others were not

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(1) (1848) 12 Q. B. 515.

(3) (1862) 3 F. & F. 29.

(2) (1854) 3 E. & B. 942.

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guilty also, the full penalty must be inflicted on each precisely as if he had committed the crime unaided. Indeed, from the point of view of criminal jurisprudence, the circumstance that the wrong-doer had participants in the commission of the crime may sometimes make his position worse. In any event, where a crime has been committed jointly by two persons, the guilt of one is undoubtedly not mitigated, even though it may not be enhanced from the fact that another may be also guilty. The essence of the matter is that the proceeding has been instituted not to indemnify a person to the extent of the loss he may have suffered from a wrongful act, but to inflict punishment on the wrong-doer for an act which the Government deems injurious to the public at large. From the point of view of principle, consequently, the rule must be deemed established beyond question that all who participate in the commission of a crime are severally responsible to the State, as though the crime has been committed by any one of them acting alone: there is *prima facie* no such thing as division of responsibility among the several participants in a crime. Based on this elementary truth, the conclusion must be sustained that, although joint actors in the commission of a crime are jointly tried and convicted each must be separately punished as if he had committed the offence alone and must respond in full to his own separate sentence. I do not deny that it is open to the Legislature to depart from this fundamental principle and to rule that where particular offence has been committed by several persons jointly, one collective sentence should be inflicted upon them jointly; but, in my opinion, the legislative intent to depart from what I cannot but consider as a fundamental principle of criminal jurisprudence, must be established beyond all reasonable doubt.

Reliance has been placed on behalf of the petitioners upon a passage in the work of Paley on the Law of Summary Convictions (8th edition, page 287), where the rule is stated in the following terms: "Though several offenders may be, as it seems, included in one conviction for offences jointly committed, it depends upon the wording of the particular statutes applicable to each case, and the quality of the offence, whether each person be liable to a distinct penalty or all collectively to but one." This formulation is based upon a long line of authorities which have an interesting history. The earliest case traceable in the reports is that of *Partridge v. Naylor* (1) which was an action of debt against three persons, upon 1 & 2 Ph. and M. c. 12, section 1, to recover a penalty for wrongfully impounding a distress. The Court of Error, reversing the divided judgment of the Court of Common Pleas, ruled that the judgment should be joint for one penalty against all. It should not be overlooked that the proceeding to recover the penalty under the statute was in form *civil*. In the next case, *King v. Drake* (2), on a conviction of two persons under 13 Car. II c. 10, a statute enacted for the prevention of the unlawful coursing of deer in a forest, a separate penalty of the full amount was imposed upon each and was maintained, notwithstanding the contention that the design of the statute was to give only one satisfaction for the deer spoiled. In *Reg. v. King* (3), upon conviction of two persons under 3 Wm. & M. c. 10, section 2, a statute enacted for the prevention of deer-stealing, a separate penalty of the maximum amount was imposed upon each offender. Reliance was placed upon *Partridge v. Naylor* (1), but Powell J. overruled the contention on the ground that the

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(1) (1596) Noy 52, 62.

(2) (1687) 2 Show. 489.

(3) (1712) 1 Salk. 182.

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penalty was not in the nature of a satisfaction to the party aggrieved, but a punishment on the offender; and he added the important observation that "crimes are several, though debts be joint." The next case, *Marriott v. Shaw* (1), which arose upon a conviction under 5 Anne, c. 14, section 4, for killing several hares on the same day, is of no real assistance, except to this extent that the acts were treated as one offence. No reason was assigned, however, in support of this view. In *Hardymann v. Whitaker* (2), which arose upon 12 Anne, c. 14, section 4, it was ruled that only one penalty was, under the terms of the statute, jointly payable by the persons who had, in contravention thereof, kept a lurcher to kill and destroy the game. The same view was subsequently taken with reference to the same statute, in *King v. Bleasdale* (3). Meanwhile, the question had arisen for consideration before Lord Mansfield in *Rex v. Clark* (4), where three persons had been placed on trial under 8 Geo. I, c. 18, s. 25, for assaulting and resisting Custom House Officers in the execution of their duty and rescuing out of their custody brandy and geneva which they had seized. It was argued that there was only one offence for which only one penalty could be inflicted. This contention was overruled, but Lord Mansfield proceeded to enunciate the principle applicable to cases of this character: "Where the offence is in its nature single, and cannot be severed, there the penalty shall be only single, because though several persons may join in committing it, it still constitutes but one offence. But where the offence is in its nature several, and where every person concerned may be separately guilty of it, there each offender is separately liable to the penalty, because the crime of each

(1) (1718) 1 Comyns R. 274.

(3) (1792) 4 T. R. 809.

(2) (1749) 2 East. 573.

(4) (1777) 2 Cowp. 610.

is distinct from the offence of the others and each is punishable for his own crime. For instance, the offence created by the Stat. 1 & 2 Ph. and M. c. 12, is 'the impounding a distress in a wrong place.' (a) One, two, three or four may impound it wrongfully : it still is but one act of impounding, it cannot be severed. It is but one offence, and, therefore, shall be satisfied by one forfeiture. (b) So, under the Stat. 5 Anne c. 14, for the preservation of the game, killing a hare is but one offence in its nature ; whether one or twenty kill it, it cannot be killed more than once. (c) If partridges are netted by night, two, three or more may draw the net, but still it constitutes but one offence. (d) But this statute relates to an offence in its nature several, a several offence at common law, and the statute adds a further sanction against that which each man must commit severally. One may resist, another molest, another run away with the goods, one may break the officer's arm, another put out his eye. All these are distinct acts, and every one's offence is entire and complete in its nature. (e) Therefore, each person is liable to a penalty for his own separate offence."

With all respect for the opinion of so eminent a Judge as Lord Mansfield, one may be permitted to make a few observations on this exposition of the law. (a) The statute 1 & 2 Ph. and M. c. 12, to which reference is made, contemplates a proceeding *civil* in form for recovery of the penalty : consequently, the case decided thereupon, *Partridge v. Naylor*(1) cannot be accepted as a precedent applicable to a criminal proceeding. (b) With reference to the statement that an act of impounding by one, two, three or four, is one offence, suppose the object impounded was a human being, and numbers were jointly indicted for his false

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imprisonment: would there, then, be but one act, one offence, or would each be liable to receive his several sentence, the full penalty of the law? (c) With reference to the observation that killing a hare is but one offence in its nature, for whether one or twenty kill it, it cannot be killed more than once, may it not be asked whether the analogy would apply to the case of killing a man? If twenty kill a man once and are found guilty of wilful murder, is the statutory sentence to be passed upon one or upon all? (d) With reference to the illustration about the netting of partridges, what would happen if two, three or more persons jointly draw away the net and steal it? Would not all be liable to be convicted and would not each receive the appropriate sentence? (e) With regard to the concluding observation, the question may be put whether each would not be guilty of what the joint offender did, as if his own hand had performed the act? I see no escape from the conclusion that the illustrations given by Lord Mansfield are not based on sound principle, and that the true distinction was pointed out by Powell J., when he observed that the criminal proceeding is taken not with a view to indemnify the person injured but to punish the offender. The cases of *King v. Hube*(1) and *Burnard v. Gostling*(2) do not develop any fresh point of view, and, consequently, do not require detailed consideration. But reference may be made to the observation of Ashurst J., in the former case to the effect that if the Court were to hold that where one person had disturbed a congregation, he would be liable to pay a penalty of twenty pounds, but that if the offender had 19 persons to assist him, each would be liable to pay twenty shillings only, the conclusion would be absurd, because the amount of the penalty would be diminished

(1) (1794) 5 T.R., 542.

(2) (1802) 2 East 569.

with the increase in the gravity of the offence. The later decisions in *Morgan v. Brown* (1), *Reg v. Dean* (2), *Queen v. Cridland* (3), *In re Hartley* (4), *Mayhew v. Wardley* (5), and *Queen v. Littlechild* (6), all furnish instances where, upon joint trial, separate sentences were passed upon the offenders who had jointly committed the offences. In one of these cases, *Reg. v. Dean* (2), Baron Alderson observed that he must look at the statute to see whether it was intended that every person offending should be punished or merely that every offence should be punished. This is open to the obvious criticism that when an offence is said to be punished, it is the offender who is visited with the punishment. The truth is that when an offence has been jointly committed, each offender is *primâ facie* liable to be punished irrespective of the guilt of the others who may have participated with him in the commission of the crime. To take a case out of the operation of this, the primary rule, the legislative intent must be made manifest beyond doubt that all the offenders must be jointly subjected to a single penalty. The Court should not lightly depart from the principle that since one who participates with others in a crime is guilty as though he had performed the criminal act unaided, on a joint conviction of all the offenders or on a conviction of some after the others have had their punishment, each should receive a several sentence, the same in extent and intensity as if he had done the whole alone and had been alone convicted. The principle is otherwise in a civil suit for damages where the full penalty for the damage suffered can be exacted only once.

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(1) (1836) 4 A. & E. 515.

(4) (1862) 31 L. J. M. C. 232.

(2) (1843) 12 M. & W. 39.

(5) (1863) 14 C. B. N. S. 550.

(3) (1857) 7 E. & B. 853.

(6) (1871) L. R. 6 Q. B. 293.

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As regards cases decided in the Courts of this country, stress has been laid principally upon the decision of a Full Bench of the Bombay High Court in *Reg. v. Showdar Ghenar* (1) which overruled the earlier decision in *Reg. v. Vakhatchand* (2) and restored the authority of the decision in *Queen v. Rijgur* (3). The decision of the Full Bench is to the effect that where several persons knowingly harbour, keep or conceal a parcel of smuggled opium, under section 4 of Bombay Regulation, XXI of 1827, only one penalty of double the value of such opium and of double the amount of duty leviable upon it is recoverable. This view was followed by this Court in a case under section 17 of the Bengal Salt Act (Beng. Act VII of 1864): *Re Gungadhur Sahoo* (4). It is not necessary for our present purpose to determine whether, upon the terms of the Regulation in question, the interpretation adopted by the Full Bench can be justified. It cannot be denied, however, that the question of construction was one of great doubt, as is amply indicated by the fact that the Full Bench of five Judges overruled a decision, which, though pronounced by three Judges, had the concurrence of three other Judges who had been consulted by them. Sir Michael Westropp, who had been a party to the earlier decision and recorded an elaborate opinion in support of his altered view, was guided principally by the decisions in England, and also relied upon the judgment of the Court of Queen's Bench in Ireland in *Queen v. M'Naghten* (5). The cases in England, as we have seen, no doubt recognise a distinction between several penalty and joint penalty for offences jointly committed, and rest this differentiation upon the phraseology of particular

(1) (1870) 7 Bom. H. C. R. 39.

(4) (1874) 22 W. R. Cr. 9.

(2) (1863) 1 Bom. H. C. R. 50.

(5) (1845) 9 Ir. L. R. 93.

(3) (1854) 3 Morris. Fouz. Rep. 673.

statutes and the quality of the offence in each case. In the large majority of cases, however, the conclusion was actually reached that the offence was several in its nature, and each offender was liable to have a separate penalty inflicted on him. We further find that the earliest case traceable, where a joint penalty was imposed, was in form a civil proceeding, and that although the distinction between a civil and a criminal proceeding was emphasised as early as 1712, it was overlooked or ignored in subsequent cases, which treated the matter, not as one of principle, but rather as one of form dependent upon minute distinctions in the language used in the statutes. Indeed, a review of the cases in the English Courts almost creates the impression that the distinction maintained therein between joint and several penalty owed its origin to a desire to mitigate the severity of the game laws or the revenue laws. As regards the Irish case mentioned by Westropp C. J., it does not directly elucidate the point in controversy, and merely shows that when a person has been adjudged guilty on a charge that he did knowingly harbour and conceal, and also did knowingly permit and suffer to be harboured and concealed, certain contraband articles, it could not be maintained that the information charged two offences and that there was duplicity in the conviction. I do not feel pressed by the decision of the Full Bench of the Bombay High Court and I am not prepared to extend its application to other cases. As Lord Mansfield said in *Rex v. Clark* (1), there is no cause of greater ambiguity than arguing from cases without distinguishing accurately the grounds upon which they were determined; and Couch, C.J. endorsed the same view when he rested his decision in *Reg. v. Showdar Ghenar* (2), on the language of the Regulation.

(1) (1777) 2 Cowp. 610.

(2) (1870) 7 Bom. H. C. R. 39.

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The question under consideration has been repeatedly examined in the Courts of the United States, and the view is well settled there that, as a general rule, crimes are several and that when two or more persons are convicted of the same offence in a criminal prosecution (as distinguished from a penal or *quidam* action which is civil) the sentence against them must be several; each is subject to the full penalty and punishment provided for the criminal act in the same manner as if he had been the sole offender. Reference may here be made to some of the leading decisions on the point. In *U. S. v. Ismenard* (1), wherein the defendants were jointly indicted and convicted for keeping a gaming house, it was held that the fine imposed must be several. In *Turner v. U. S.* (2), wherein the defendants were jointly indicted and convicted of cutting timber on Government land, the Court said:—“The defendants were indicted, tried jointly, and both were convicted, and the Jury found the damages committed by them to be \$ 248·80. Section 2461 of the Revised Statutes provides that ‘every such person (meaning every person who has violated the section) shall pay a fine of not less than triple the value of the trees and timber so cut, destroyed, or removed, and shall be imprisoned for not exceeding twelve months.’ The fine provided is a part of the punishment as much as is the imprisonment; it is necessarily assessed against each just the same as the imprisonment. Any reasoning which would make the money-penalty joint would necessarily make the imprisonment joint.” In *McLeod v. State* (3), it was held that where two persons were jointly indicted, tried and convicted for living in adultery, and their

(1) (1803) 1 Cranch C. C. 150. (3) (1860) 35 Ala. 395.

(2) (1895) 66 Fed. 280.

common surety confessed judgment, on the conviction a separate judgment should be rendered against each with his surety, for the amount of the fine and costs. In *Curtis v. Hurlburt* (1), the Court said: "All offences at the Common Law are several, that is, though several join in the commission of the act, and that act is single, yet each is guilty severally, and is liable to a separate punishment. If two should jointly take, and with a felonious intent carry away, the goods of another, each would be guilty of the crime of theft, and might be prosecuted jointly or separately. When a statute creates an offence, it may be joint or several according to the language made use of. The statute on which the present question arises is that 'no person shall use any bush seine in Ousatonnick river, etc., on penalty of sixty-seven dollars for every such offence.' The question is whether this is a several offence in each person concerned in it, or only one offence in them all, so that one penalty only can be inflicted. No words can be more appropriate than the words of this statute to designate a several offence—no person shall do the act under a certain penalty for each offence. It is the same as the words, 'every person who does the act,'—'whoever does the act'—'if any person shall do the act,' such person shall suffer a certain penalty. As by the Common Law, when several join in the commission of a crime, each is considered as severally doing the act, so here, though several may join in the act, yet every person is considered as severally committing the crime and incurs a several penalty." In *State v. Hunter* (2), it was said: "The record does not present us with a copy of the indictment, but it is stated in argument that the defendants were jointly indicted under the statute for the suppression of intemperance. Section 4789 of the

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(1) (1817) 2 Conn. 309.

(2) (1871) 33 Iowa 361.

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Revision provides that in all misdemeanors, defendants jointly indicted may be tried separately or jointly in the discretion of the Court; but there is no statutory provision, to which our attention has been called, authorizing a joint judgment. Indeed, in the very nature of the case, the judgments would necessarily be separate against each person convicted. The person committing an offence against the State must himself be amenable to the law; another person cannot be substituted for him or be made to suffer for his violation, and although two or more persons may together commit an offence, each is punishable for his own crime and not for that of the other. The infliction of the penalty upon one of two jointly tried and convicted will not satisfy the judgment in respect to the other, as will a satisfaction by one of two joint judgment-debtors in a civil action operate as a full satisfaction of the judgment as to both." In *Caldwell v. Commonwealth* (1), the Court said: "In prosecutions on behalf of the Commonwealth, each individual is responsible for his own individual act, and must answer to the Commonwealth, personally, for his own personal offence. If both are guilty, each is guilty, and each must make his fine to the Commonwealth for the penalty fixed by law for the offence of which he has been found guilty. Though in criminal and penal cases the prosecution may be joint, the judgment should be several, as the judgment addressed itself to each individual offender as the punishment of his *delictum*." In *Bosley v. Commonwealth* (2), it was said: "We think the verdict and judgment erroneous. Although the law allows a joint indictment and trial, still a joint judgment is erroneous, because thereby one of the defendants may be compelled to pay the whole amount, and in that event he would not be

(1) (1838) 7 Dana (Ky.) 229.

(2) (1832) 7 J. J. Marsh (Ky.) 598.

entitled to contribution from his co-defendants. Thus the other defendants would escape punishment entirely, and the whole burden might fall upon him who was least blameable in the transaction. So far it would savour of punishing one man for the guilt of another." In *Jones v. Commonwealth* (1), wherein several persons were indicted for an assault, and it was held error to impose a joint fine against them, Roane J., said: "In this country, I consider the construction as fortified not only by the principles of natural justice, which forbid that one man should be punished for the fault of another, but also by the clause of the Bill of Rights prohibiting excessive fines, and the Act of October, 1876 (c. 65, 12 St. L. 355) founded on the spirit of it, and providing that the fine should be according to the degree of the fault and the estate of the offender. But it is most unreasonable, and directly in the teeth of the Act, that one man should suffer the punishment imposed by the jury upon all who may chance to be with him, and who were all in the contemplation of the jury who assessed the fine. This is so unjust and contrary to the spirit of the Bill of Rights that even if it were established by adjudged cases to be the law, nay, even if an Act of Assembly should pass authorizing it, in express terms, I should most probably be of opinion that the one should be exploded and the other declared unconstitutional and not law." In *Waltzer v. State* (2), the Court said: "It is unnecessary to notice all the errors assigned in this case, as the form of the judgment is fatal. This was a criminal prosecution, and even admitting that all of the defendants could be and were properly tried jointly, the punishment should have been several. Each should have been sentenced to pay a fine

(1) (1799) 1 Cal. (Va.) 555.

(2) (1854) 3 Wis. 785.

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according to the nature and aggravation of his offence. Every individual is answerable for his conduct to the State. The guilt of one is neither mitigated nor enhanced from the fact that another may be also guilty." In *Reg. v. Granville* (1), wherein it was contended that where two persons, in that case a partnership, were convicted of selling intoxicating liquors, the fine imposed upon them should be several and not joint, the Court, though the case was reversed on another ground, said: "In 2 Hawkins, P. C. c. 48, section 18, it is laid down, that where there are several defendants, a joint award of one fine against them all is erroneous, for it ought to be several against each defendant; for, otherwise, one who had paid his proportionable part might be confined in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another." In Burns' Justice (30th ed.), Volume I, p. 1154, where this passage from Hawkins is referred to, it is said: "If several defendants are convicted, whether the offence is in its nature single or joint, a joint award of one penalty against them is bad." There is a statement to the same effect in Paley on Convictions, p. 278. And in *Morgan v. Brown* (2), Littledale J. said at p. 519: "The general result of the authorities cited in Hawkins, I think, is that, where a fine is imposed upon several defendants, it should be imposed upon them separately." There are, on the other hand, isolated cases where joint penalties have been imposed, [*Lemons v. State* (3), *Barada v. State* (4—explained in *State v. Berry* (5),—*Wiggins v. Henderson* (6)]. The rule deducible from the cases in the American Courts may consequently be best stated in the words of Caldwell J.

(1) (1888) 5 Manitoba L. R. 153

(4) (1850) 13 Mo. 94.

(2) (1836) 4 A. & E. 515.

(5) (1855) 21 Mo. 504.

(3) (1874) 50 Ala. 130.

(6) (1894) 22 Nev. 103.

in *Thompson v. State* (1): "though joint actors in the commission of the same offence and jointly tried and convicted, it is proper that punishment be inflicted upon the defendants separately as if each had committed the offence alone; each is bound to respond in full to his own separate sentence; satisfaction, in whole or in part, of that against one of them not satisfying that against the other one, in any sense or to any extent,": *People v. Kent*, (2), *State v. White* (3), *U. S. v. Babson* (4), *Calico v. State* (5), *Straughan v. State* (6), *State v. Hopkyns* (7), *Gathings v. State* (8), *State v. Gay* (9), *March v. People* (10), *State v. Smith* (11).

What then is the true position if we seek to interpret bye-law 85, read with section 561 of the Calcutta Municipal Act? The section authorises the General Committee to prescribe by a bye-law that a breach thereof shall be punishable with fine which may extend to twenty rupees. Bye-law 85 provides that every person guilty of a breach of bye-law 83 shall be punishable with fine which may extend to twenty rupees. *Primâ facie* every person guilty of such breach is punishable, regardless of the circumstance that there may be other persons who may have participated in the commission of the offence and may be equally punishable. I do not lay stress on the use of the expression "every person" in bye-law 85; the inference I would draw would be precisely the same even if the bye-law had been so framed as to read that "breaches of any of these bye-laws shall be

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(1) (1900) 105 Tenn. 177.

(2) (1908) 151 Mech. 134.

(3) (1911) 125 Tenn. 143.

(4) (1838) 1 Ware. (U.S.) 462.

(5) (1842) 4 Ark. 430.

(6) (1855) 16 Ark. 37.

(7) (1845) 7 Black. (Ind.) 494.

(8) (1870) 44 Miss. 343.

(9) (1847) 10 Mo. 440.

(10) (1849) 7 Barb. N. Y. 391.

(11) (1817) 1 Nott. & M. (S. C.) 13.

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punishable." I do not base my conclusion on the form of the expression, but on the substance of the matter. We have to construe a provision which operates as a statutory rule for the punishment of an offence. Unless intention to the contrary is established beyond the possibility of all doubt, the Court should interpret the provision in the light of the principle that all who participate in the commission of a crime are severally responsible, as though the offence had been committed by each of them acting alone. In the case before us, there is nothing to indicate that the framers of the bye-law acted on the principle that the larger the number of persons who participate in its violation, the smaller the responsibility and liability to punishment of each offender. I see no escape from the conclusion that the decision of the majority in *Amrita Lal Bose v. Corporation of Calcutta* (1) cannot be defended on principle. I am fortified in this view by the nature of the order made in that case. The Magistrate had imposed a fine of twenty rupees upon one of the accused persons and a fine of ten rupees upon each of the others. This Court imposed a fine of twenty rupees to be apportioned equally amongst them. If, as was held, the quality of the offence made the liability joint, how could a distinct penalty be imposed upon each? Mr. Norton was constrained to concede that a sentence in this form could not be supported; on the other hand, if a joint sentence was passed and the Crown proceeded to levy the fine from one of the offenders, the others would in substance escape all punishment. No explanation was offered in justification of such a result. Furthermore, it is conceivable that in a case of this character the several offenders might not be guilty to the same extent, and some discrimination should be

(1) (1917) 21 C. W. N. 1009.

exercised in imposing the sentence, as the Magistrate actually did. No explanation was even suggested as to how this can be achieved if a joint penalty has to be inflicted or if the penalty imposed has to be equally apportioned.

My conclusions may be summarised as follows :

(i) As a general principle of criminal law, all who participate in the commission of an offence are severally responsible, as though the offence had been committed by each of them acting alone: consequently, although as joint actors in the commission of the crime, they may be jointly tried and convicted, each must be separately punished as if he had committed the offence alone. (ii) This general principle is applicable in the construction of bye-law 85 read with bye-law 83 and section 561 of the Calcutta Municipal Act; consequently, each person who has committed a breach of the bye-law in question is, upon conviction, liable to be punished with the maximum amount of the prescribed fine, regardless of the number of persons who may have been associated with him in the commission of the breach. (iii) The case of *Amrita Lal Bose v. Corporation of Calcutta* (1) was not correctly decided, and (iv) the convictions and sentences in the six cases before us must be upheld and the Rules discharged.

FLETCHER J. I agree in the judgment delivered by the learned Chief Justice.

RICHARDSON J. I agree. The question whether the petitioners are liable to single punishment or to several punishment for each offence committed is mainly a question of construction.

The answer depends in the first instance on the bye-laws under which the petitioners were convicted and sentenced.

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The validity of bye-law 83 is not questioned, but it is argued that bye-law 85 is repugnant to the principal Act, and *ultra vires*. The repugnancy suggested is that while section 561 of the Act enables "a breach" of a bye-law to be punished, bye-law 85 says that "every person guilty of a breach" shall be punishable. It is argued that if the bye-law means that every person participating in a breach is separately amenable to the punishment provided it goes further than section 561 warrants. This contention is in my judgment untenable.

In the nature of things when a punishment is provided for an offence, the punishment must obviously fall on an offender. What is meant by "punishing an offence" is punishing an offender for that offence. The expression may be elliptical, but it is perfectly natural and quite in accordance with general usage and the usage of the Legislature in other Acts. In section 40 of the Penal Code an "offence" is spoken of as "a thing made punishable." In clause (o) of section 4 of the Criminal Procedure Code the definition of "offence" is "any act or omission made punishable by any law for the time being in force." This definition is repeated in section 3 (37) of the General Clauses Act, 1897, and in section 3 (30) of the Bengal General Clauses Act, 1899. Section 195 of the Criminal Procedure Code speaks of "any offence punishable" under certain specified sections of the Penal Code. In section 64 of the Penal Code the punishable offence and the offender are brought into juxtaposition:—"In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine"

According then to the ordinary meaning of the words which occur in section 561, they refer to and contemplate the punishment of offenders. Within the

limits expressly prescribed, the General Committee are empowered to make provisions for the punishment of those who commit breaches of their bye-laws. The words of the section are, in my opinion, wide enough to authorize provision being made for the punishment of joint offenders or persons who join in committing a breach of any bye-law not only in the manner described as single, but also in the manner described as several. If, therefore, bye-law 85 permits several punishments, the contention that it is for that reason inconsistent with section 561 and, therefore, invalid, falls to the ground.

Then what is the true meaning of bye-law 85? In my opinion, the bye-law read by itself is clearly capable of being construed so as to authorize several punishment. More than that, both by their own force and upon the analogy of the penalty sections of the Penal Code, such a construction is the obvious and natural construction of the words used. The bye-laws, it must be borne in mind, cannot be read as providing for either mode of punishment in the alternative. Whichever mode is provided, the other is excluded. There are no alternative words, and where the law imposes a several penalty, a joint penalty is illegal and *vice versa*. *Primâ facie* the bye-law clearly imposes several punishment.

This conclusion is supported by certain provisions of a general character included in the codified criminal law of this country. It is not disputed that offences under the Penal Code are severally punishable. Under section 40 of the Code, the word "offence" primarily denotes "a thing made punishable under this Code", but in certain specific sections of the Code it denotes "a thing made punishable under this Code or under any special or local law": a "special law" being by definition a law applicable to a particular subject, and

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a "local law", a law applicable only to a particular part of British India. Among the sections in which the word has the extended meaning are sections 64 to 67 relating to imprisonment in default of payment of fine, section 71 relating to the punishment of offences made up of several parts, and sections 109, 110, 112, 114, 115, 116 and 117 which occur in the Chapter relating to Abetment. The result is to assimilate in these and other respects offences punishable under a special or local law to offences punishable under the Penal Code, and I note in passing that in the case which has been so much referred to, *Rex v. Clark* (1), Aston J. gave the liability to punishment for abetment as a reason for considering that the offence in that case was a "several" offence.

I conceive that an offence created by, and punishable under, bye-laws is an offence under the special or local law under which the bye-laws were framed. But if there be any doubt as to the applicability of section 40 of the Penal Code to offences under bye-laws, no such doubt attaches to the provision, also a general provision, contained in section 26 of the Bengal General Clauses Act, 1899, to the following effect:—"Sections 63 to 70 of the Indian Penal Code, and the provisions of the Code of Criminal Procedure for the time being in force in relation to the issue and the execution of warrants for the levy of fines shall apply to all fines imposed under any Bengal Act or any rule or bye-law made under any Bengal Act, unless the Act, rule or bye-law contains an express provision to the contrary." This enactment makes no mention of the sections of the Penal Code relating to Abetment, but it is not necessary to press the argument founded on those sections and for all practical purposes that argument may be disregarded. It is sufficient in the

present case to advert to the provisions relating to imprisonment in default of payment of fine. It may be that the proviso at the end of section 26 leaves room for the imposition of a single fine or a single punishment in any case in which the Legislature may choose by apt words to impose such a penalty, and that accordingly the notion of "single offence," whatever the expression may mean, is not excluded. But clearly in the generality of cases, in all those cases such as the present where the provisions of the Penal Code referred to are not made inapplicable, the mode of punishment contemplated is several punishment. Under section 64 of the Penal Code "in every case in which . . . an offence is punishable with fine only, in which the offender is sentenced to fine, it shall be competent to the Court which sentences such offender to direct by the sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term." In such cases the term of imprisonment which may be imposed in default is regulated by section 67. Now, if it be supposed that the punishment to which the petitioners are liable under bye-law 85 is a single punishment, only a single fine can be imposed. The fine cannot be apportioned among the petitioners, because as soon as it is apportioned, the punishment becomes several. That being so, how is imprisonment in default of payment to be imposed? The imprisonment, as the Advocate-General pointed out, cannot be apportioned any more than the fine.

Some attempt was made to argue that the petitioners as constituting a partnership were one "person" within the definition in section 3 (32) of the Bengal General Clauses Act. But that definition only applies "unless there is anything repugnant in the subject or context" and for the present purpose it is quite impossible to regard them as one person. They might

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perhaps criminally be jointly liable to a fine, just as civilly they might be jointly liable under a decree for damages, but they are not liable to fine as one person and they cannot be imprisoned as one person. Mr. Norton admitted that if one of the partners took no part in continuing a performance after 1 A.M. he would not be liable at all. The petitioners are clearly liable not as a partnership but as three individuals, though as three individuals they might conceivably be jointly liable.

In my opinion, these provisions of the Penal Code, made applicable by section 26 of the Bengal General Clauses Act, strongly support the view that the punishment admissible under bye-law 85 is several and not single.

Lastly, it is said that there is something in the nature of the offence created by bye-law 83 such that bye-law 85 must be read, if this is at all possible, as imposing only a single punishment. The offence, it is said, is by its nature a "single" offence. The argument was based by Mr. Norton on the decision of a Full Bench of the Bombay High Court in *Reg. v. Showdar Ghenar*(1) where nearly all the English cases are cited by Westropp C. J. It would be tedious to go through these cases again. The mainstay of the whole contention is to be found in the observations of Lord Mansfield in *Rex v. Clark* (2), which have already been read.

The difficulty, I have, is in understanding the conception of a "single offence" which is involved in those observations, nor was much light thrown upon the point at the Bar. The Advocate-General (for the Municipality) felt himself pressed by the weight of Lord Mansfield's authority, and it is impossible not to share that feeling. Speaking with diffidence, I confess

(1) (1870) 7 Bom. H. C. R. 39. (2) (1777) 2 Cowp. 610.

that I cannot in my own mind see how any offence which "several persons may join in committing" can by its nature be repugnant or antagonistic to the notion of several punishment. The illustrations given do not help me. As the learned Chief Justice observed in the course of the argument, a man, like a hare, has only one life, yet several persons may be severally hanged or transported for life for the same murder. I have tried to think of an explanation, but the only explanation I can suggest is that a term which may be appropriate to the punishment provided in particular cases is sometimes ascribed to the offence. In such cases what is really single is the punishment and not the offence. I have not examined the cases to see whether this suggestion is well-founded. Nor would such an inquiry serve any useful purpose. For, if the suggestion accounts for the original employment of the term "single offence", the term might afterwards come to be employed in cases where it could not be so easily justified. Another suggestion which may be hazarded as regards the earlier English cases, especially cases under the game laws, is that they were decided according to what the Judges conceived to be "the equity of the statute", a mode of construction which has gone out of favour and fashion in consequence of the more precise legislation of modern times.

The term "single" has other uses: it sometimes denotes one complete offence as distinguished from other and separate offences of the same kind. In this sense the theft of a book is a single offence. There is not a separate theft of each leaf. So by "exercising" his ordinary calling on "a Sunday" a man only commits one offence [*Crepps v. Durdan* (1) *per* Lord Mansfield]. Curiously enough in that case the hare was again

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referred to in illustration, "killing a single hare is an offence, but the killing ten more on the same day will not multiply the offence or the penalty imposed by the statute for killing one."

The term again may perhaps be applied to offences, such as perjury, which an offender can only commit alone.

But neither of these uses of the word affords any clue for the determination of offences which several persons may join in committing but which nevertheless are so single in their nature as to demand only a single punishment. I do not know by what tests such "single" offences are to be distinguished from "several" offences. I confess, therefore, that I can find nothing in the Bombay case or in the English cases there cited which really throws any light on the question how this bye-law 85 made under the Calcutta Municipal Act is to be construed. The offence of continuing a performance later than 1 A.M. seems in a sense single enough, but is it more single than stealing a book? If, however, the distinction between "single" and "several" offences, as explained in *Rex. v. Clark* (1), is to be applied, an offence according to that case appears to be "several" if it is the product of different persons doing different things, and I can easily conceive that the offence in the present case, the continuance of a performance after 1 A.M., was on each occasion on which it was committed, the result of different acts done by each of the three petitioners.

From whatever point of view the question before us be approached, the considerations which arise point to the conclusion that the words of bye-law 85 must be taken in their ordinary meaning. "Every person guilty of a breach . . . shall be punishable" means that every person convicted of a breach shall be

liable to the penalty. This conclusion is consistent with the most recent of the English cases cited before us, which is also apparently the last reported case in England on the point: *Queen v. Littlechild* (1). There, without going into the question whether the offence committed was in its nature single or several, separate penalties were upheld, because a penalty was imposed by the Act upon each person convicted. So in the passage from Paley on Summary Convictions (6th Edition, page 276), which was quoted by Hannen J., "if either the penalty be imposed by the Act on each person convicted, even where the offence would in its own nature be single, or if the quality of the offence be such that the guilt of one person may be distinct from that of the other—in either of these cases the penalties are several." Paley's summary of the result of the English cases supports the suggestion above ventured that a "single offence" in this connection means an offence for which a single punishment is expressly provided by law.

For the reasons indicated, I agree that the question put to the Full Bench should be answered in the negative.

E. H. M.

(1) (1871) L. R. 6 Q. B. 293.

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APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Mookerjee J.

THAKURDAS MOTILAL

v.

JOSEPH ISKENDER.*

Execution of Decree—Procedure—Practice—Rival decree-holders—Assets in the hands of Registrar—Attachment of fund with Accountant-General—Anticipatory attachment—Priority—Rateable distribution—Civil Procedure Code (Act V of 1908), s. 73 ; O. XXI, r. 52.

A question of rateable distribution under s. 73 of the Code of Civil Procedure of 1908 arises amongst creditors where the application for execution has been made before the receipt of assets.

Order XXI, r. 52, does not allow of an anticipatory attachment of money expected to reach the hands of a public officer and is restricted only to money actually in his hands.

Where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment ; as the attachments create no charge or lien upon the fund, so long as the fund is in the custody of the Court, the Court is bound to apply the rules of justice, equity and good conscience in the determination of the relative rights of the creditors who wish to proceed against the fund in *custodiâ legis* for the satisfaction of their dues. In such circumstances, the fund, if sufficient to meet in full the claims of the creditors, should be rateably distributed amongst them.

APPEAL by the firm of Thakurdas Motilal, the attaching creditors of Kally Charan Sett.

On the 11th December 1915, in execution of a mortgage decree obtained by Raja Sreenath Roy, certain properties belonging to one Kally Charan Sett were sold by order of the High Court, Original Side, for Rs. 1,63,500 and out of this sum Rs. 41,000 was paid

*Appeal from Original Order, No. 99 of 1916, Suit No. 617 of 1915.

to the Registrar on the same date by the auction purchaser and the balance was deposited with him on the 24th January, 1916. On the 16th February 1916, the said sum of Rs. 1,63,500 was transferred by the Registrar to the Comptroller-General of Accounts with the privity of the Accountant-General who was the same officer as the Registrar.

On the 16th December, 1915, a money decree for Rs. 16,519-7 was passed against the said Kally Charan Sett in favour of one Joseph Iskender, who, on the 13th January, 1916, applied for execution praying that the total amount of Rs. 16,519-7, with interest and costs "be realized by attachment to the extent of Rs. 17,300 in the hands of the Accountant-General of this Honourable Court payable to the defendant out of a sum of Rs. 1,63,500 representing the sale-proceeds of the defendant's immoveable properties sold by the Registrar of this Honourable Court on the 11th December last and the amount be paid to me." On the same date Joseph Iskender obtained from the Registrar the order for execution of his decree. The Registrar, thereupon, wrote to the Accountant-General of the High Court, Original Side, informing him of the said application for attachment and requesting him to withhold the said sum of Rs. 1,63,500 subject to the further order of the Court.

Prior to the abovementioned mortgage decree, namely, on the 14th August, 1915, the firm of Thakurdas Motilal obtained a decree against the said Kally Charan Sett for Rs. 14,842-12-6 and, on the 26th January, 1916, the said firm applied for attachment of the said sum of Rs. 1,63,500 and obtained the order on the 15th February, 1916, presumably in a similar manner to the order of attachment obtained by Joseph Iskender.

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On the 24th August, 1915, one Chooney Lal Johury, a third creditor of the said Kally Charan Sett, obtained a decree for money against him and. on the 11th February, 1916, he applied for execution of his decree and obtained an order for attachment of the same fund on the 29th February, 1916.

On the 15th March, 1916, there was an order whereby the mortgagee, Raja Sreenath Roy, received satisfaction of his claim in respect of his mortgage decree and the sum of Rs. 29,894-5-11 was left in Court to the credit of the mortgage suit.

On the 20th July, 1916, Joseph Iskender obtained an *ex parte* order that the sum of Rs. 29,894-5-11 should be transferred from the mortgage suit to his own suit against the said Kally Charan Sett. In his petition he based his application on the grounds that he had already obtained the order for attachment on the 18th January, 1916, and that he was desirous of obtaining the order for transfer of the entire sum of Rs. 29,894-5-11 from the credit of the mortgage suit to the credit of his suit against Kally Charan Sett with a view to enable himself to apply for rateable distribution of the funds amongst himself and the other attaching creditors of Kally Charan Sett. On the 26th August, 1916, Joseph Iskender applied to Mr. Justice Chaudhuri in the suit between himself and the said Kally Charan Sett for an order that the Comptroller-General of Accounts for the time being of the Government of India and the Secretary and Treasurer for the time being of the Bank of Bengal with the privity of the Accountant-General of the High Court should, out of the funds standing to the credit of this suit, viz., Rs. 29,894-5-11, pay to the plaintiff the sum of Rs. 16,519-7, being the decretal amount due to him under the decree made in this suit, dated the 16th December, 1916, with interest and costs.

Mr. Justice Chaudhuri granted this application and directed that the balance of the funds, after payment of Joseph Iskender, should be rateably distributed as between the creditors who have attached. One of the creditors, the firm of Thakurdas Motilal, thereupon, appealed.

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Mr. N. N. Sircar (with him *Mr. H. C. Mozumdar*), for the appellant. The respondent was not entitled to any portion of the balance of the fund in Court belonging to the judgment-debtor; but if it were held by the Court that the respondent was entitled to have the whole of his claim satisfied out of these funds, there ought not to be any rateable distribution in respect of the balance as between the appellant and Chooney Lal Johury, the 3rd attaching creditor. This application was made under O. XXI, r. 52 of the Civil Procedure Code, and at the time the appellant and the respondent obtained their orders respectively there was no money in the hands of the Accountant-General of the High Court, though the 3rd attaching creditor was in a better position, inasmuch as his application was made after the funds had been received by the Accountant-General. The respondent's attachment was not a valid attachment and execution could not proceed against the fund sought to be attached: *Raja Padmanand Singh v. Ramaprosad Malvi* (1) was relied on. The mere fact that the Accountant-General of the High Court was the same officer as the Registrar, did not validate an invalid order. Under the Rules and Orders of the Calcutta High Court (Hechle's Rules and Orders, pages 253 and 254), the procedure and practice with reference to the deposit of moneys with the Registrar and the subsequent transfer of the same to the Accountant-General of the High Court were set

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out. As regards the rateable distribution of the funds amongst the creditors, the question whether s. 73 of the Civil Procedure Code would apply, depended on the fact that the application for execution was made before the receipt of assets. In view of this construction of this section, no question of rateable distribution would arise between the creditors. *The Maharajah of Burdwan v. Apurba Krishna Roy* (1) was relied on. O. XXI, r. 86 of the Code was referred to. There being no valid attachment the respondent's application ought to be disallowed.

Mr. S. R. Das (with him *Mr. B. L. Mitter*), for the respondent. The respondent's attachment was perfectly valid. The Registrar and the Accountant-General were one and the same person and there was no doubt as to the identity of the fund sought to be attached. Assuming that the attachment of both the respondent and the appellant were invalid, there was money in Court belonging to the judgment-debtor, from which the respondent had already applied to the Court to have his claim satisfied. There was no objection on the part of Chooney Lal Johury to this application and the respondent was entitled to have his debt paid out of this money. O. XXI, r. 1 of the Code was referred to. If there were any question as to the validity of the respondent's attachment and his subsequent application to the Court to have his claim satisfied, the respondent would make an application to that effect now.

[At this stage of the case the 3rd judgment-creditor, Chooney Lal Johury, who had been hitherto unrepresented in this appeal, asked leave through his counsel, Mr. D. N. Basu, to appear as respondent. The Court granted the leave].

• *Mr. D. N. Basu*, for the respondent, Chooney Lal

Johury. This respondent's attachment was made after the fund had passed into the hands of the Accountant-General. It was consequently a valid attachment and had gained priority over the attachments of both the appellant and the respondent, Joseph Iskender. Chooney Lal Johury must, therefore, be first paid out of this fund the whole amount of his claim and after him the claims of the appellant and Joseph Iskender could be satisfied either rateably or otherwise: *Tiruvengadial v. Thiruvengadiah* (1).

Mr. S. R. Das, in reply. On principle there ought to be a rateable distribution of the fund between the creditors.

Mr. N. N. Sircar, in reply. The attachment did not create any charge or lien upon the attached property, nor any title in the attaching creditor. In support of these two propositions, *Frederick Peacock v. Madan Gopal* (2) and *Raghunath Das v. Sundar Das Khetri* (3) were relied on. Section 64 and O. XXI, r. 17 of the Civil Procedure Code were referred to. A fresh application was made to the effect that the appellants' claim should be satisfied out of the fund in the hands of the Accountant-General.

SANDERSON C. J. This is an appeal from a judgment of Mr. Justice Chaudhuri, whereby he granted the application of Joseph Iskender. That application was made for an order that the Comptroller-General of Accounts for the time being of the Government of India and the Secretary and Treasurer for the time being of the Bank of Bengal with the privity of the Accountant-General of this Court do out of the funds standing to the credit of this suit (No. 617 of 1915), viz., Rs. 29,894-5-11 pay to the plaintiff the sum

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(1) (1913) 26 Mad. L. J. 364.

(2) (1902) I. L. R. 29 Calc. 428.

(3) (1914) I. L. R. 42 Calc. 72.

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of Rs. 16,519-7, being the decretal amount due to him under the decree made in this suit dated 16th December, 1915, with interest.

One of the points which has been raised in the course of the argument is, in my judgment, of considerable importance, and in order that it may be correctly appreciated, it is necessary to look at the facts carefully and in some detail.

The facts, as stated by the learned counsel for the appellant, Mr. Sircar, in opening the appeal and which, it is agreed, are not disputed are as follows:—It happens that on the 14th of August, 1915, Thakurdas Motilal, the name under which the appellants carry on business, obtained a decree for Rs. 14,842-12-6, against one Kally Charan Sett. At sometime or other—the date of which is not material—a decree was made in a mortgage suit against the said Kally Charan Sett, and certain property which was comprised in the mortgage was on the 11th of December, 1915, sold for the sum of Rs. 1,63,500. The sum of Rs. 41,000 was paid on the day of the purchase by the purchaser, as a deposit made to the Registrar of the Original Side of the High Court. On the 16th of December, 1915, the respondent in this appeal, Joseph Iskender, obtained a money decree for Rs. 16,519-7, against the said Kally Charan Sett. On the 13th of January, 1916, the respondent Joseph Iskender obtained an order for attachment of moneys to the extent of Rs. 17,300 out of the above-mentioned purchase-money of Rs. 1,63,500. The application upon which that order was made was as follows: “I pray that the total amount of Rs. 16,519-7 together with interest on the principal sum up to date of payment and the costs of the suit and the costs of taking out execution be realized by attachment to the extent of Rs. 17,300 in the hands of the Accountant-General of this Honourable Court payable to the defendant

out of a sum of Rs. 1,63,500 representing the sale-proceeds of the defendant's immoveable properties sold by the Registrar of this Honourable Court on the 11th December last in execution of decrees dated, respectively, 17th February 1911, and 1st March 1912, made in suit No. 1144 of 1910 of this Court (*Raja Sreenath Roy v. the defendant in this suit*) and the amount be paid to me." The order which was made upon that application by the Registrar on behalf of the Court was in these terms, and it was addressed to the Accountant-General of the High Court, Original Side. "Sir,—The plaintiff having applied under Order XXI, rule 52 of the Code of Civil Procedure for an attachment of the money now in your hands to the extent of Rs. 17,300 payable to the defendant out of a sum of Rs. 1,63,500 representing the sale-proceeds of the defendant's immoveable property sold by the Registrar of this Court on the 11th December 1915 in execution of decrees dated, respectively the 17th February 1911 and 1st March 1912, made in suit No. 1144 of 1910 of this Court (*Raja Sreenath Roy v. the defendant in this suit*), I am directed to request that you will withhold the said money subject to the further order of this Court. (Sd.) J. H. Hechle, Registrar."

Now, it is to be noticed that at that time there was no money in the hands of the Accountant-General in respect of this matter. The sum of Rs. 41,000 which was paid as a deposit was in the hands of Mr. Hechle in the capacity of the Registrar of the High Court, and it was not until the 24th of January, 1916 that the purchaser upon an order of the Court paid the balance into Court. On the 26th of January, two days after the money was paid in, the appellant applied for attachment of the sale-proceeds. On the 11th of February, Chooney Lal Johury, another creditor, made a similar application for attachment of the sale-proceeds.

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On the 15th of February, 1916, the appellant obtained an order for attachment, and that attachment was effected as I assume in a manner similar to that in which the attachment of the respondent was effected on the 13th of January, 1916. Then comes an important date: It appears that on the 16th of February, 1916, the money was transferred by the Registrar to the Comptroller-General of Accounts with the privity of the Accountant-General. On the 29th of February, the other creditor Chooney Lal Johury obtained an order for the attachment of the sale-proceeds in execution of his decree. On the 15th of March, there was an order that the mortgagee should be entitled to take out of Court, a sufficient sum in satisfaction of his claim in respect of the mortgage decree, leaving a balance of Rs. 29,894-5-11 in Court, to the credit of the mortgage suit. On the 20th of July, 1916, an order was obtained, as we are informed, *ex parte* by the respondent Joseph Iskender that this balance of Rs. 29,894-5-11 should be transferred from the mortgage suit to the suit in which the respondent was the plaintiff and Kally Charan Sett was the defendant. That application was based upon the allegation that the respondent had obtained an order for attachment of the balance of the purchase-money, and it was also upon the basis that the application was made for the purpose of having the sum transferred in order that it might be rateably distributed amongst the creditors of the defendant Kally Charan Sett. These are all the dates and facts which I think it necessary for me to mention for the purpose of my judgment. Then the application in this case was made on the 26th August, 1916. I have already referred to the application and I need not mention the terms again. Upon that application the learned Judge made an order that the respondent should be paid out of the balance the sum which he asks.

It is against that order that this appeal is brought: and, the first point that was argued by the learned counsel for the appellant was that this application was one which was made under Order XXI, rule 52 of the Code of Civil Procedure. I do not think myself that there is any doubt that that was so, having regard to the documents which have been put before us. That rule is as follows: "where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued." Then there is a form in the Appendix (No. 21 of Appendix E which was followed in this case in the order which I have read, dated the 13th January, 1916.

The learned counsel for the appellant argued that inasmuch as this was an order directed to the Accountant-General of the High Court and inasmuch as at that time there was no money in the hands of the Accountant-General, the attachment was invalid. In my judgment that argument must prevail.

It was urged, on the other hand, that Mr. Hechle occupied the position of the Registrar and also that of the Accountant-General and that there was no doubt as to the identity of the fund which was in question and that the intention was that the respondent was asking for an order to attach the balance which might remain over after the mortgagee was paid out. That might be so. It is quite true that there was no doubt about the identity of the fund, as there was no doubt as to what was the object of the respondent. But we have got to follow the words of the statute which are, in my opinion, quite clear and which have been also interpreted by the decision of the High Court. I think

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that when the rule says that "where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer," it is clear that that rule was only intended to relate to an officer who has, at the time the application is made, in his hands the fund which may be the subject of attachment. My interpretation of the rule is borne out by the judgment of this Court to which my learned brother, Mr. Justice Mookerjee, was a party, in the case of *Raja Padmanand Singh v. Ramaprosad Malvi* (1). The passage in his judgment to which I desire to refer is at page 19 and is as follows: "In so far as rule 52 of Order XXI is concerned, the case is equally clear. As already stated, that rule applies only where the property to be attached is in the custody of a public officer. It does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, and is restricted only to money actually in his hands." Those are words which, in my judgment, are strictly applicable to this case, and are words with which I entirely agree: and, I think that is sufficient for the judgment at which I have arrived, namely, that the attachment which was attempted to be made by the respondent on the 13th of January, 1916, was an invalid attachment.

The result of that conclusion is that not only was the attachment of the respondent an invalid one, but also the attachment effected by the appellant on the 15th of February, 1916, was invalid, because it was exactly in the same form as the attachment of the respondent. At that time there were no funds in the hands of the Accountant-General: and, therefore, the result is that the attachment of the respondent and the attachment of the appellant were both equally invalid.

Then it was argued by Mr. Das on behalf of the respondent that even if that were so, and even if the attachment which was effected by his client was invalid, still there was this sum standing to the credit of the suit in which his client was the plaintiff and he had made an application to have so much as would satisfy his claim paid out of that sum, and that inasmuch as the creditor whose attachment was valid, namely, Chooney Lal Johury had not made any objection, and inasmuch as the attachment effected by Mr. Sircar's client was invalid he was entitled to have the money paid out of that sum. With that argument I cannot agree for this simple reason. To my mind it is obvious that that application was based upon the original application for execution. It was clearly, having regard to the wording of the petition, made in continuation of his application for execution: and, inasmuch as I have already come to the conclusion that the attachment was an invalid attachment, I do not think that that application for the payment out of the money in question was one which could have been acceded to by the Court, quite apart from the fact that the order for the transfer of the money had been obtained *ex parte* upon a representation that it was for the purpose of distributing the money rateably amongst the creditors. The position, therefore, is this: Both the attachment effected by the respondent and the attachment effected by the appellant were invalid: and it appears that the attachment effected by Chooney Lal Johury which was made after the money had reached the hands of the Accountant-General, was a valid attachment. I now have to consider what are the rights of Chooney Lal Johury, on the one hand and the appellant and respondent on the other hand, because on this part of the case the appellant and the respondent are in the same position. It appears from

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the enquiries which have been made during the course of the argument, that there are no other creditors who attached or attempted to attach this fund.

Now, the learned counsel for the respondent, Mr. Das, and the learned counsel for the appellant Mr. Sircar, have both applied to us to-day that we should allow them to make an application for attachment of the fund. To this application, in my judgment, we ought to accede, not only because we think that otherwise a great deal of unnecessary expense would be incurred, but also because we think that right and justice necessitate that we should accede to that application. Therefore, I will consider this further question from the point of view of there being an attachment effected not only on behalf of Chooney Lal Johury on the 29th February, 1916, but also there being an attachment on behalf of the respondent and an attachment on behalf of the appellant both of which became effective on the 3rd of January, 1917, to-day, simultaneously and contemporaneously. This is a point which, in my judgment, is of considerable importance.

The learned counsel for Chooney Lal Johury has argued that inasmuch as his client's attachment was antecedent in point of date to the attachment effected by the respondent and the attachment effected by the appellant, his client ought to be allowed to take, out of the money which is in Court, the whole amount of his client's debt; and, that after his debt has been satisfied to the full extent he does not mind how the fund is to be treated whether rateably or not. I have come to the conclusion that that argument ought not to be acceded to. The conclusion depends upon what is the effect and meaning of such an attachment as has occurred in this case. Does it, on the one hand, give to the creditor who has attached the money, any interest

in the fund, or is it merely an order restraining alienation of the fund until further order of the Court? In my judgment it means the latter: and, I think that has been decided not only by authority of this Court but also by authority of the Privy Council. I desire only to refer to three cases, the first of which is the case of *Soobul Chunder Law v. Russick Lall Mitter* (1), another case which was decided by a Full Bench of this Court, is the case of *Frederick Peacock v. Madan Gopal* (2), and, the third is a Privy Council decision, *Raghunath Das v. Sundar Das Khetri* (3); the result of all those decisions is that such attachment as has occurred in this case is merely to prevent alienation of the fund subject to the further order of the Court, and does not give title to the creditor who effected the attachment. That being so, when it is found that subsequently two other creditors have obtained attachment of the same fund, what is the further order of the Court that is to be made? Having regard to the scheme of the Code, I think that the order ought to be that those creditors ought to share rateably with regard to the amounts which are due to them respectively.

For these reasons, I think that this appeal must be allowed, and the order will be drawn up as I have stated. I think it would be desirable that the order before it is finally settled should be submitted to the learned counsel appearing on both sides, and if necessary they will have liberty to apply. The applications on behalf of the respondent and of the appellant in respect of the attachment and payment out, must be put in writing before half past four to-day, as stated by the learned counsel, and those applications when put in will be granted and our order will be that this fund must be distributed amongst the three creditors

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(1) (1888) I. L. R. 15 Calc. 202.

(3) (1914) I. L. R. 42 Calc. 72 ;

(2) (1902) I. L. R. 29 Calc. 428.

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rateably with regard to their respective debts. For this purpose it is agreed by the parties that the money in Court will be paid out to Messrs. Morgan and Co., who will distribute the whole amount—the money which is already in their hands and the money so paid out of Court, amongst the three creditors in accordance with our judgment, less poundage.

With regard to costs, we think that the appellant has succeeded materially upon this appeal, and has in fact got the judgment of Mr. Justice Chaudhuri set aside. We direct that Mr Das's client do pay the costs of Mr. Sircar's client in this appeal, and that Chooney Lal Johury do pay his own costs in this appeal, and that as regards the costs in the Court of first instance, each party do pay his own costs.

MOOKERJEE J. The facts material for the determination of the question in controversy may be briefly stated. In execution of a mortgage decree obtained by Sreenath Roy against Kally Charan Sett, the hypothecated properties were sold on the 11th December, 1915 for Rs. 1,63,500. The purchaser, on that date, brought into Court Rs. 41,000; the balance was deposited on the 24th January, 1916. The decree-holder was paid his dues and the surplus, Rs. 29,894, was, on the 16th February, transferred by the Registrar to the Accountant-General. Kally Charan Sett, it appears, had a number of unsecured creditors of whom three are now before this Court—one as appellant, the other two as respondents. Of these three, Thakurdas Motilal held a decree for money, dated the 14th August, 1915. On the 26th January, 1916, he applied to execute his decree and obtained an order for attachment on the 15th February following. Chooney Lal Johury had obtained a decree for money on the 24th August, 1915. He applied for execution on the 11th February, 1916, and

the attachment at his instance was effected on the 29th February, 1916. Joseph Iskender obtained his decree on the 16th December, 1915. His application for execution was presented and the attachment at his instance was effected, on the 13th January, 1916. The Court is now invited to decide the relative rights of these three creditors in respect of the surplus fund in Court.

It is plain that no question of rateable distribution under section 73 of the Code of Civil Procedure of 1908 arises as amongst these creditors. Section 73(1) provides that "where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the cost of realization, shall be rateably distributed among all such persons." If this sub-section were applicable it would have to be shown that the application for execution had been made before the receipt of assets. In the case before us, this condition is not fulfilled, as the assets must be deemed to have been received on the 24th January 1916: *Maharajah of Burdwan v. Apurba Krishna Roy* (1). On the other hand, under clause (c) of the proviso to section 73 which is applicable to this case, it is plain that the point of time for consideration is the date of the sale of the property. Here the sale took place on the 11th December, 1915, and as none of the creditors had applied for execution prior to that date, section 73 has no application, as was erroneously assumed by one or other of the parties at an earlier stage of the proceedings. The real question then reduces to this, was there a valid attachment effected of this fund by any of the three creditors? There is no room for

(1) (1911) 15 C. W. N. 872.

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controversy that the attachment effected at the instance of Chooney Lal Johury on the 29th February, 1916 was valid and operative in law. But as regards the attachments alleged to have been effected by Thakurdas Motilal and Joseph Iskender, the question arises, whether steps were taken by them in conformity with rule 52 of Order XXI of the Code. Now, that rule provides that "where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued." In the case before us. the attachments were effected by both these creditors on the assumption that there was a fund in the hands of the Accountant-General of this Court. But on the dates when the attachments were effected, there was no such fund in the hands of the Accountant-General. Consequently, neither of the attachments would be valid and operative, unless it was held that the rule allows of an anticipatory attachment of money expected to reach the hands of a public officer. A reference to the terms of Form 21 of Appendix E to the Code, however, makes it manifest that the rule does not allow of an anticipatory attachment of money expected to reach the hands of a public officer and is limited in its application only to money actually in his hands. This was the view adopted by this Court in the case of *Raja Padmanand Singh v. Ramaprosad Malvi*(1) where the Court followed the earlier decision of the Bombay High Court in *Tulaji v. Balabhai*(2). The principle of the rule, as concisely stated by Mr. Justice Beaman in *Umabai v. Amritrao Anant*(3),

(1) (1911) 16 C. W. N. 14.

(2) (1896) 1. L. R. 22 Bom. 39.

(3) (1914) I. L. R. 39 Bom. 80.

is that what is attached must be something in existence and not merely in the future. The same view has been recently adopted by the Madras High Court in *Tiruvengadial v. Thiruvengadiah* (1). There is consequently no escape from the conclusion that the attachments on the basis whereof Thakurdas Motilal and Joseph Iskender seek relief are not operative in law.

The question finally arises, what is the relative situation of the three creditors. Thakurdas Motilal and Joseph Iskender have now prayed for the immediate attachment of the fund in Court and that application we have decided to grant. Consequently, the position at the present moment is that there is an attachment effected by Chooney Lal Johury on the 29th February, 1916, as also two other attachments effected at the instance of Thakurdas Motilal and Joseph Iskender on the 3rd January, 1917. As between these two attaching creditors, no question of priority can arise, but the question remains whether Chooney Lal Johury is entitled to precedence by reason of the priority of his attachment. He claims such priority and relies upon the decision in *Tiruvengadial v. Thiruvengadiah* (1) which does support his contention. The contrary view, however, has been taken by the Madras High Court itself in *Suikena Katum Sahiba v. Hajee Mahomed Abdul Azeez Badsha Sahib* (2). We are in this Court free to decide the question on first principles, and when the matter is so regarded, it seems fairly clear that no question of priority can arise on the basis of the successive attachments. As pointed out by the Judicial Committee in *Moti Lal v. Karrabuldin* (3) and *Raghunath Das v. Sundar Das Khetri* (4), attachment does not create any title in the

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(1) (1913) 26 Mad. L. J. 364.

(4) (1914) I. L. R. 42 Calc. 72 ;

(2) (1913) I. L. R. 38 Mad. 221.

L. R. 41 I. A. 251.

(3) (1897) I. L. R. 25 Calc. 179 ; L. R. 24 I. A. 170.

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attaching creditor; it creates no charge or lien upon the attached property, the attaching creditor does not acquire the status of a secured creditor. Attachment is effected by a Court for the benefit of the execution creditor by prevention of private alienation by the judgment-debtor of property out of which the creditor seeks relief. This view was adopted by this Court in the cases of *Soobul Chunder Law v. Russick Lall Mitter* (1) and *Frederick Peacock v. Madan Gopal* (2). Consequently, we must apply the principle that where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment; as the attachments create no charge or lien upon the fund, it is obvious that so long as the fund is in the custody of the Court, the Court is bound to apply the rules of justice, equity and good conscience in the determination of the relative rights of the creditors who wish to proceed against the fund in *custodiâ legis* for the satisfaction of their dues. In such circumstances, the fund, if insufficient to meet in full the claims of the creditors, should be rateably distributed amongst them.

On these grounds, I hold that the order now under appeal cannot be supported and must be set aside.

O. M.

Appeal dismissed.

Attorneys for the appellants: *O. C. Ganguly & Co.*

Attorneys for the respondents: *Morgan & Co; Dey & Kshetrya; B. N. Basu & Co.*

(1) (1888) I. L. R. 15 Calc. 202.

(2) (1902) I. L. R. 29 Calc. 842.

APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C.J. and Mookerjee J.

STE. CROIX

v.

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Divorce—Husband and wife—Petition by husband—Adultery—Condonation—Collusion—Conduct conducing to adultery—Desertion—Divorce Act (IV of 1369) ss. 12, 13, 14.

Condonation is a conclusion of fact, not of law, and means the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven. The forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation and this must be shown by a re-instatement of the wife in her former position which renders proof of conjugal cohabitation with restitution of conjugal rights necessary.

Collusion is held to exist where the initiation of the proceeding for dissolution of marriage is procured and its conduct (especially if abstention from defence be a term) provided for by agreement or bargain between the spouses or their agents, although it does not appear that any specific fact has been falsely dealt with or withheld.

The mere fact that the husband refused marital intercourse to the wife by itself is not such wilful neglect or misconduct as conduced to the adultery; nor can the fact that the parties went their own way, in the sense that they had their own friends and interests, be said to be conduct conducing to adultery even when coupled with the abstinence by the husband from marital intercourse.

The fact that the husband had abstained from marital intercourse without reasonable cause and that the parties went their own way in the sense that they had their own friends and interests, would not justify a finding of desertion on the part of the petitioner.

APPEAL by Beatrice Alice de Ste. Croix, from the judgment of Greaves J.

* Appeal from Original Civil, No. 45 of 1916, in Matrimonial Suit No. 21 of 1915.

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Phillip de Ste. Croix, the husband of the above named appellant, filed a petition for the dissolution of his marriage on the ground of adultery of his wife. The parties were married on the 8th May, 1894, and there was issue of the marriage, three children, two of whom survived and were respectively 20 and 10 years of age, the eldest being born on the 16th July, 1895, and the youngest on the 27th October, 1905. The husband and wife lived together as such until about the year 1906, when the husband ceased to have any marital intercourse with his wife, although there was no physical cause for this and although he had no aversion for her. On a certain occasion in 1909 or 1910, the wife, who was jealous of the visits paid by her husband to her younger sister, followed him to her sister's house, and on entering the same, she found her husband sitting alongside her sister holding her hand. In connection with this incident the next day the husband said to his wife: "I don't want you to follow me, you go your own way and I go mine." They, however, continued to occupy the same bed room as they had been hitherto doing, except for the period of one and-a-half month, *viz.*, from the 30th April to the 16th June, 1915, when the wife was away at Darjeeling with her children, and for the further period of one month, *viz.*, from the 12th October to the 11th or 12th November, 1915, when the husband was away by himself on a holiday, at Ootacamund. Upon the latter's return from his holiday, he found that his wife was not in the house. He for the first time on that occasion suspected his wife's fidelity. He then had a conversation with his wife's mother, who informed him of his wife's misconduct. On the 12th November, 1915, the wife in the presence of her mother made a confession to her husband, which she, subsequently, on the same day, put in writing,

that she had misconducted herself by committing adultery with one C. Ingles and that she was with child by him. That same night the husband and wife retired as usual to the same room and slept in adjoining beds and continued thereafter to live in the same state in which they had been living since the period when the husband ceased to have marital intercourse with her, until the 17th November, 1915, when, in consequence of his interview with his solicitors, he asked her to leave the house. This she accordingly did. Subsequently, she was confined and gave birth to a child on the 23rd November, 1915. 'Thereafter, the wife though she did not reside with her husband again, was allowed at her own request to visit her husband at his house, which she frequently did. She dined with him on his birthday, which was on the 10th December, on Christmas day and on New Year's day when he kissed her. She also breakfasted with him upon certain occasions. On the 16th December, 1915, the husband filed his divorce proceeding against his wife. In answer to his petition the wife denied her adultery, but on coming to trial she abandoned her denial of adultery and contended that her husband had condoned the adultery complained of, that there was collusion between her husband and herself in presenting and prosecuting the divorce proceeding, that her husband had been guilty of such wilful neglect and misconduct as had conduced to the adultery, that her husband had been guilty of cruelty to her and, lastly, that her husband had deserted her without reasonable cause. In support of these contentions, she relied on the facts above stated as also on the letters written by her to him, wherein she stated, *inter alia*, that her husband had agreed to re-marry her after the statutory period had expired, to befriend her, not

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to allow her to be on the streets, and, if there would be nothing to prevent it, to give her welcome in his house after the divorce proceeding, provided that she did not defend the proceeding. Mr. Justice Greaves, by whom the suit was originally heard, found against the wife on all the issues raised by her and granted a decree *nisi*. Against that judgment and decree the wife preferred this appeal.

Mr. A. A. Avetoom (with him *Mr. A. K. Ghose*), for the appellant. Section 14 of the Indian Divorce Act defined condonation. Though it was in accordance with the definition in the reported cases, it could not be urged against the appellant in this case, where the husband had not cohabited with his wife for years. The evidence here was such as would establish condonation in law. See *Bernstein v. Bernstein* (1), *Browne and Watts on Divorce* 8th Edn. p. 37 and *Mr. Meller's Case* (2) therein referred to. The agreement of the husband to remarry the appellant after the expiry of 6 months from the date of the decree, to befriend her, not to allow her to be stranded and even, if possible, to give her welcome in his home after the divorce proceeding had ended, provided she undertook not to defend the suit, amounted to collusion and in support of this contention the cases of *Churchward v. Churchward* (3) and *Butler v. Butler* (4) were relied upon and reference was made to s. 13 of the Divorce Act. In regard to conduct conducing to adultery, the husband's statement to his wife some 5 or 6 years before the divorce proceeding, *viz.*, "you go your way and I go mine," coupled with the fact that he wilfully abstained from having

(1) [1893] P. 292.

(2) Macq. H. L. 607, Sess. 1811.

(3) [1895] P. 7.

(4) (1890) 15 P. D. 66 ;
59 L. J. P. & M. 25.

marital intercourse with her for several years past without reasonable cause, amounted to such conduct: *Jeffreys v. Jeffreys* (1) and *Parry v. Parry* (2). The ground of cruelty was not urged. As to desertion, it was contended that where the husband wilfully and habitually abstained from cohabitation with his wife for years without reasonable cause, such conduct amounted to desertion: *Yeatman v. Yeatman* (3).

Mr. P. L. Buckland (with him *Mr. Surita*), for the respondent. Desertion as relied on by the appellant was not such as was defined in ss. 3 (9) and 10 of the Divorce Act, but what may be so called constructive desertion. In the case of desertion there must be actual abandonment and then only would it constitute a matrimonial offence. Refusal to have marital intercourse must be shown to amount to desertion before it became a matrimonial offence. Mere abstinence from such intercourse, *per se*, was not a matrimonial offence and could not amount to conduct conducing to adultery: *Synge v. Synge* (4). In the present case there was no abandonment. To make the matrimonial offence complete there must, therefore, be something more than mere refusal to have marital intercourse. In *Dickinson v. Dickinson* (5), marriage was never consummated and was distinguishable: *Forster v. Forster* (6) and *Rowe v. Rowe* (7). As regards collusion, there could be no collusion in the absence of an agreement. An agreement was the foundation of a case of collusion, and there was no evidence of any such agreement: *Keats v. Keats* (8), *Hall v. Hall* (9), *Anichini v. Anichini* (10) and *Peacock*

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(1) (1864) 3 Sw. & Tr. 493 ;
33 L. J., P. & M. 84.

(2) [1896] P. 37 ;
65 L. J., P. & M. 35.

(3) (1868) 37 L. J., P. & M. 37.

(4) [1900] P. 180.

(5) (1889) 62 L. T. 330

(6) (1790) 1 Hagg. Con. 144.

(7) (1865) 4 Sw. & Tr. 162.

(8) (1859) 1 Sw. & Tr. 334.

(9) (1891) 64 L. T. 837.

(10) (1839) 2 Curt. 210.

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v. *Peacock* (1). The facts do not establish collusion or condonation.

Mr. Avetoom, in reply. Under s. 14 of the Divorce Act the Court had discretion to give a decree for the dissolution of marriage and in exercising that discretion the conduct of the husband must be taken into consideration. *Gatehouse v. Gatehouse* (2) decided that the offence of desertion was complete from the moment the husband made up his mind to abandon marital relations with his wife and *Synge v. Synge* (3) was referred to in support of this contention. Refusal to have marital relations with the wife, coupled with the husband telling her "you go your own way and I go mine," amounted to conduct conducing to adultery: *Hawkins v. Hawkins* (4) and *Parry v. Parry* (5). As to collusion, the passages in Halsbury, Vol. 16, p. 489 ss. 1001 and 1002 were relied on. There was evidence to show that the husband did request the wife not to defend the suit. On the question of condonation, there was the evidence of the wife breakfasting and dining on various occasions with the husband and with his knowledge and consent, and the latter kissing her.

Cur. adv. vult.

SANDERSON C. J. This is an appeal against the judgment of Greaves J. given on the 11th April, 1916, by Beatrice Alice de Ste Croix who was the respondent in divorce proceedings brought against her by her husband on the ground of her adultery with the co-respondent.

The learned Judge granted a decree *nisi* for the dissolution of the marriage. The adultery was admitted

(1) (1858) 27 L.J., P. & M. 71 ;

1 Sw. & Tr. 183.

(2) (1867) 1 P. & D. 331.

(3) [1901] P. 317.

(4) (1885) 10 P. D. 177.

(5) [1896] P. 37.

by the respondent, and the appeal was based on allegations (i) that the petitioner had condoned the adultery complained of, (ii) that the petition was presented or prosecuted in collusion with the respondent, (iii) that the petitioner had been guilty of such wilful neglect or misconduct as had conduced to the adultery, and (iv) that the petitioner had deserted the respondent without reasonable cause.

As regards the first point the learned Judge held that the petitioner had not condoned the offence.

Condonation is a conclusion of fact, not of law, and means the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven. See *Bernstein v. Bernstein* (1) per Lopes L. J. at page 303, or as stated by the Judge ordinary in his direction to the Jury in *Keats v. Keats* (2), condonation "means a blotting out of the offence imputed so as to restore the offending party to the same position he or she occupied before the offence was committed. The forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation and this must be shown by a reinstatement of the wife in her former position which renders proof of conjugal cohabitation or the restitution of conjugal rights necessary. Section 14 of the Indian Divorce Act, 1869, provides that no adultery shall be deemed to have been condoned within the meaning of the Act unless where conjugal cohabitation has been resumed or continued.

The facts relied upon in this case to show condonation are that when the confession of adultery was made on the night of Friday the 12th November, 1915, the wife was allowed to occupy her bed (which was a

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(1) [1893] P. 292, 303.

(2) (1859) 1 Sw. & Tr. 334.

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separate bed) in the same room as her husband and to live in the house as usual until the 17th November (Wednesday); that, inasmuch as the husband and wife had not had any marital intercourse for 9 years, the husband, by allowing the wife to occupy the bedroom and to live in the house, had reinstated the wife in her former position and had completely forgiven her.

I do not think this is the right conclusion. The husband had at once, as soon as he was informed of the adultery, on the night of Friday 12th November, asserted his intention to take proceedings to protect the interests of his children and himself. He had been told that his wife was going to have a child (she was in fact confined on the 23rd November), he was obviously very sorry for her, and he had his two girls living in the house.

This happened on Friday. Monday was a holiday on which solicitors' offices were closed. He went to see his solicitors on Tuesday, and in consequence of their advice he decided she must leave the house though he was anxious to give her shelter in some part of his house, and she consequently left his house on Wednesday, the 17th.

I see no reason for interfering with the learned Judge's finding of fact on this part of the case.

As to what happened afterwards, the facts relied upon by the learned counsel for the appellant were, that at the wife's request she was allowed to visit the husband at his house on his birthday, that she dined with him and the family on that day and on Christmas day, that he kissed her, that on several occasions she breakfasted with him and had other meetings, and the letters which the respondent wrote to the petitioner are also relied on. In considering the events of this period it must be remembered that on

25th November, 1911, the wife wrote, "you say you have forgiven me and yet, Phil, you are taking the matter up," evidently referring to the husband's determination to proceed for divorce. Proceedings were in fact begun on 16th December, 1915, and the letters written by the respondent are full of appeals to the husband to discontinue the proceedings and take her back, and may be summarised in her own words used in evidence, "he said he had forgiven me I did not accept that because he was going on with the suit. What I wanted was that he should forgive me and take me back. Although he had forgiven me to some extent, he had not forgiven me to the extent that he was willing to take me back". I need not refer to the rest of the facts which are fully dealt with in the learned Judge's judgment. It is sufficient for me to say I see no reason for interfering with his decision of fact that the petitioner had not condoned the respondent's adultery.

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As regards the second point, *viz.*, collusion. It is based on two allegations.

First, that the petitioner had agreed that if the respondent would not defend the case, he would marry her again after the expiration of six months from the decree.

The learned Judge came to the conclusion that the respondent was labouring under a delusion in this matter, and found as a fact that there was no understanding or agreement that if the respondent did not defend the suit, the petitioner would re-marry her.

The learned Judge has seen the witnesses and accepted the petitioner's evidence on this part of the case, and on the materials before the Court. I am not prepared to interfere with his finding of fact.

Second, it was alleged that it was agreed between the parties that if the wife would not defend the

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suit, the husband would be a friend to her and would not allow her to be on the streets, and would, if there was no condition against it, give her welcome in his house. This matter is not dealt with by the learned Judge, nor is it referred to in the pleadings, and judging from the very careful manner in which he has dealt with the various points, I am constrained to think that much reliance, if any, was not placed on it at the trial. The husband denied that his promise to be a friend to her was conditional upon her not defending the case. I refer to the concluding sentences of the learned Judge's judgment, and I think it is clear that the petitioner was anxious that she should not defend the suit to avoid publicity and scandal, and at the same time intended to help as far as he could the woman who had been his wife for so many years.

The proceedings were in fact defended from the outset, and I find no sufficient ground for holding that the proceedings were either instituted or prosecuted in collusion.

As regards the 3rd point, *viz.*, wilful neglect or misconduct conducing to the adultery.

The allegations relating to this point were:—

(i) that the petitioner had wilfully abstained from marital intercourse with the respondent for a period of about nine years, although there was no physical cause for this and he had no aversion to her;

(ii) that he had gone his own way and the wife had done the same.

As regards the first allegation, the mere fact that the husband refrained from marital intercourse, in my judgment, cannot by itself be held to be such wilful neglect or misconduct as conducing to the adultery.

In *Forster v. Forster* (1), at p. 154, Lord Stowell

(1) (1790) 1 Hagg. Con. 144.

speaking of a case in which a husband was alleged to have withdrawn himself from his wife's bed, said—

“This species of malicious desertion is a ground of divorce in some countries—certainly not so here—and still less will it justify a wife, in a resort to unlawful pleasures, that lawful ones are withdrawn. It is not, however, to be considered as a matter perfectly light in the behaviour of a complaining husband, that he has withdrawn himself without cause, and without consent, from the discharge of duties that belong to the very institution of marriage; and, if he has so done, he ought to feel less surprise, if consequences of human infirmity should ensue”; and in *Synge v. Synge* (1), at p. 207, the President of the Probate Division and Admiralty Division in dealing with a case where the wife had refused marital intercourse to the husband, said “I do not say that the wife has been guilty of conduct conducing to his misconduct within the meaning of the 31st section of the Act, because it appears to me that though, no doubt, a wife who behaves as the petitioner in this case behaved, is to a certain extent—as Lord Stowell said in the case to which I have referred—morally responsible, and cannot hold herself altogether free from responsibility, still I think it is a very long step—and one I cannot take—to say that a wife who refuses matrimonial intercourse has conduced to the adultery of her husband. A husband has no right to commit adultery because she refuses him. I think that would be a low and mean view to take of it. She may perhaps be morally responsible; but I do not say she has been guilty of conduct conducing to his adultery.”

I adopt the principle of these decisions and hold that the mere fact that the husband refused marital

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(1) [1900] P. 180.

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intercourse to the wife by itself is not such wilful neglect or misconduct as conduced to the adultery.

But it is argued that in this case the refusal of marital intercourse did not stand by itself; for the petitioner had wilfully neglected his wife and allowed her to go her own way while he went his.

The evidence on this point is as follows:—The wife said she had reason to complain of her husband's friendliness for her sister and on one occasion followed him to her house, and after describing what she saw, *viz.*, her husband holding her sister's hand, she said that the next day her husband said, "I don't want you to follow me, you go your way and I go mine." This was 5 or 6 years before the proceedings for divorce.

The Judge's note of the petitioner's evidence is as follows:—"For six years prior to November, 1915, I went my way and she went hers: you might say for 12 or 15 years it has always been so. We each did as we liked without consultation for 12 or 15 years." The husband's remark to which the wife speaks may have been in temporary anger at finding himself followed by his wife, but it remains to consider the state of affairs as described in the petitioner's evidence. The wife lived with her husband in the same house, slept in the same room, and was one of the family with her daughters. She had all the comforts of the house, and, under such circumstances, I agree with the learned Judge that the fact that the parties went their own way, in the sense that they had their own friends and interests, cannot be said to be conduct conducing to adultery, even when coupled with the abstinence by the husband from marital intercourse.

Lastly, as to the alleged desertion without reasonable cause:

This was based on the same ground as the allegation of wilful neglect conducing to adultery, *viz.*, the

fact that the husband had abstained from marital intercourse and that he had allowed the wife to go her own way.

The inference which the learned Judge drew from the evidence was that both parties assented to that course, and, if that be a correct inference, it is an answer to the allegation of desertion.

The wife's evidence is as follows:—

“I had no marital intercourse with my husband or 9 years. I resented this conduct, and he saw my manner towards him.”

There is no suggestion that the wife ever asked that marital intercourse should be resumed and that he refused, and we are left in the dark as to what her manner was. I am inclined to think that if the wife had had any real resentment against her husband's abstention for all these years, she would have taken some step, more unequivocal than a mere manner, to let him know what her real feelings were, and I think the learned Judge was justified by the evidence in coming to the conclusion which is above mentioned. But whether this conclusion is correct or not, I do not think the facts in this case would justify a finding of desertion on the part of the petitioner.

In *Synge v. Synge* (1), the facts were that the husband and wife had been separated for some considerable time: the husband wished to live with his wife as her husband if marital rights were allowed to him: the wife was willing to live with him, but not as his wife and only if such marital rights were not insisted on.

The learned President held on these facts that the husband did not desert his wife but rather that she deserted him: or, if he did desert her, he did so with reasonable excuse within the meaning of the Act. I gather the learned President came to the conclusion

(1) [1900] P. 180.

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that the separation, which undoubtedly took place between the parties, was due to the wife's conduct, for which she had no reasonable excuse, and that, therefore, she was guilty of desertion. The facts in this case are materially different; the abstaining from marital rights by the husband, did not result in the separation of the parties: on the contrary, they continued to live together as before, they slept in the same room, though in separate beds, and there is no evidence that during all the nine years the wife ever requested the renewal of marital intercourse, or that the husband refused. The evidence amounts to nothing more than that the husband abstained from marital intercourse, and that, though living together, the parties went their own ways, and followed their own interests, and I am not prepared to hold that under such circumstances the petitioner was guilty of desertion without reasonable cause within the meaning of the Act.

For these reasons, in my judgment, the appeal should be dismissed. On a former application made before the hearing of the appeal, this Court decided that it ought not, under the circumstances of this case, to make an order that the husband should make provision for the costs of the wife's appeal, and I see no reason for acceding to the application which has now been made on behalf of the appellant that the Court should order the respondent to pay her costs of the appeal.

The respondent's counsel not asking for costs, the appeal is dismissed: no order as to costs.

MOOKERJEE J. This is an appeal by the wife against a decree *nisi* for dissolution of marriage, made on the petition of the husband on the allegation of adultery. The facts material for the determination of

the questions in controversy are fairly clear on the evidence. The parties were married on the 8th May, 1894. They have had three children two of whom survive, the eldest born on the 16th July, 1895, and the youngest born on the 27th October, 1905. The parties have lived as husband and wife ever since their marriage, but there has been no marital intercourse during the last nine years; though they used to sleep in the same room, they had different beds. How this was brought about, cannot be determined with absolute certainty; the husband admits that it was due neither to physical cause nor to an aversion to her. An incident is, however, mentioned in the evidence, which may possibly furnish an explanation. The wife was jealous of the visits paid by her husband to her younger sister; on one occasion, she followed him, and when she entered her sister's house, found her husband sitting alongside her sister holding her hand. The next day after this incident, the husband said to the wife, "I don't want you to follow me, you go your own way and I go mine." They continued, however, to live together. The husband was absent from home for a month from the 12th October to the 11th November, 1915. The day after his return, which was a Friday, his mother-in-law informed him that his wife was about to be confined and gave the name of the co-respondent. On this discovery that his wife had committed adultery, he said that he would take proceedings to protect himself and his children. After return home of his wife the same evening, he obtained from her a written confession of her misconduct. She slept in the house that night and the four following nights, either in his bed-room or with her mother. but it is admitted that he had no intercourse with her. As Monday was a holiday, he consulted his solicitors on Tuesday the 16th November; as the result of advice

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which he received from them, the wife was made to leave his house on the 17th November. She was confined 6 days later. On the 16th December, he instituted the present proceedings against his wife and the co-respondent for dissolution of marriage. Mr. Justice Greaves has made a decree *nisi*, and the propriety of that decree is now called in question, not on the ground that adultery has not been proved, but for four special reasons mentioned in sections 12, 13 and 14 of the Indian Divorce Act, 1869.

Sections 12, 13 and 14 of the Indian Divorce Act, when analysed, show that to an application for dissolution of marriage on the ground of adultery presented by a husband under section 10, there are four absolute defences and five discretionary defences. The four absolute defences are, (i) denial of facts alleged in the petition; (ii) connivance; (iii) condonation; (iv) collusion. The five discretionary defences are, (i) adultery of petitioner; (ii) unreasonable delay in presenting or prosecuting the petition; (iii) cruelty to the other party to the marriage; (iv) desertion or wilful separation from the other party, before the alleged adultery, without excuse; (v) wilful neglect or misconduct, such as to have conduced to the adultery complained of. The appellant relies upon the third and fourth of the absolute defences and the fourth and fifth of the discretionary defences. It will be convenient to examine the validity of these objections in the order stated.

As regards condonation, reliance is placed upon the conduct of the husband both before and after the date on which the wife left the house. It has been argued that as the husband suffered his wife to remain in the house after he had been apprised of her misconduct, he must be deemed to have condoned the adultery. It has further been contended that as he is

proved to have allowed his wife to return to the house on several days, to have breakfasted with her, to have dined with her on his birthday, on Christmas day and on New Year's day and also to have kissed her, the same inference is considerably strengthened. I am unable to give effect to this contention as well founded. As Sir C. Cresswell explained in *Peacock v. Peacock* (1), condonation is forgiveness of a conjugal offence with full knowledge of all the circumstances and is a question of fact, not of law. This was emphasised in *Keats v. Keats* (2), where Lord Chelmsford held that condonation is a blotting out of the offence imputed, so as to restore the offending party to the same position he or she occupied before the offence was committed; consequently, mere forgiveness is not condonation; to be condonation it must completely restore the offending party and must be followed by cohabitation. This view is reproduced in section 14 of the Indian Divorce Act, which requires that no adultery shall be deemed to have been condoned unless where conjugal cohabitation has been resumed or continued. The expression "conjugal cohabitation" need not be given a restricted meaning, for as Lord Chelmsford puts it in *Keats v. Keats* (2), to say that condonation requires conjugal cohabitation or conjugal intercourse, leaves the nature of the cohabitation or intercourse to be adapted to the varying conditions and circumstances of different parties: *Campbell v. Campbell* (3), *Anichini v. Anichini* (4), *Seller v. Seller* (5), *Bernstein v. Bernstein* (6). Much stress has been laid on two decisions of the House of Lords: *Lord Cloncurry's Case* (7) and *Miller's Case* (8). The

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(1) (1858) 1 Sw. & Tr. 183.

(5) (1859) 1 Sw. & Tr. 482.

(2) (1859) 1 Sw. & Tr. 334.

(6) [1893] P. 292.

(3) (1856) Deane 285.

(7) (1811) Macq. H. L. Practice 606.

(4) (1839) 2 Curt. 210.

(8) (1821) Macq. H. L. Practice 627.

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first of these cases shows that the fact that the husband allowed the wife to live in his house after discovery of her misconduct did not disentitle him to a decree for dissolution, when reasonable grounds were assigned for not turning her out immediately on discovery of her infidelity. The second case does not assist the contention of the appellant in any way, because the proceedings were discontinued and the bill was abandoned; the facts proved were that the husband, though apprised of his wife's misconduct, nevertheless suffered her to remain in his house for three weeks thereafter, and they dined together for three days after the disclosure. No special circumstances were made out to explain this conduct on the part of the husband. On the other hand, the decision in *Hall v. Hall* (1) shows that the husband need not be unnecessarily harsh "towards his wife on discovery of her infidelity, to entitle him to escape the bar of condonation"; this view was affirmed on appeal, *Hall v. Hall* (2). As Sir Francis Jeune observed in the case just mentioned, the true position is that if with full knowledge of his wife's misconduct, a man says, "I wish to treat my wife just as if it had never happened," he cannot afterwards sue for relief on the ground of the adultery which he has condoned; he cannot blow hot and cold. Now, can it be really suggested that the husband has done so in this case? The answer must obviously be in the negative. From the very moment of the discovery of the misconduct, the husband announced his intention to have recourse to legal proceedings, and he has throughout persisted in that determination. He may have treated her kindly and considerately, but he certainly did not intend to restore her to her marital rights. The

(1) (1891) 64 L. T. 837.

(2) [1891] P. 302; 65 L. T. 206;
 60 L. J. P. & M. 73.

argument of the appellant ignores the distinction between condonation and forgiveness. Condonation imports forgiveness, but the reverse is not necessarily true; forgiveness is not sufficient, for the reason that the injured party may conclude to forgive the offender and at the same time withhold a complete reconciliation in the sense of reinstating the offender to conjugal cohabitation or intercourse. In my opinion, the defence of condonation cannot be sustained.

As regards collusion, the argument is based on two allegations, *first*, that the husband had promised to remarry the appellant after the expiry of the statutory period of six months, (section 57), if she did not defend the case; *secondly*, that the husband agreed, if she did not oppose the application, to be friendly to her and to provide for her in his house if there was no legal bar. As regards the first allegation, Mr. Justice Greaves has not accepted the testimony of the appellant and I see no reason to doubt the correctness of his conclusion. As regards the second allegation, it is substantially borne out by the evidence. It is thus necessary to consider whether the petition has been presented or prosecuted in collusion, within the meaning of section 13 of the Indian Divorce Act. As observed in *Gethin v. Gethin* (1), collusion implies an *agreement* or *understanding* between the parties; in other words, collusion is held to exist where the initiation of the proceeding for dissolution of marriage is procured and its conduct provided for by *agreement* or *bargain* between the spouses or their agents: *Lloyd v. Lloyd* (2), *Jessop v. Jessop* (3). In the present case, there was no understanding or agreement between the parties. No doubt, the husband suggested to his wife

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(1) (1861) 31 L. J., P. & M. 43. (2) (1859) 1 Sw. & Tr. 567.

(3) (1861) 2 Sw. & Tr. 301.

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that she should not oppose the application, but he did so to avoid publicity, and also on the ground that in view of her confession it would be absurd for her to defend the suit. There was no intention to withhold any relevant evidence from the Court. In these circumstances, it is impossible to sustain the defence of collusion. As Lopes L. J. explained in *Butler v. Butler* (1), the object of the special provision with regard to collusion is to compel the parties to come into the Court of Divorce with clean hands, it is to oblige them to bring all material and pertinent facts to the notice of the Court, to prevent their blinding the eyes of the Court in any respect, to oblige them so to act as to enable the Court to be in a position to do justice between the parties: *Bacon v. Bacon* (2), *Hunt v. Hunt* (3). On this principle, it has been held that the bar of collusion applies, even though the parties concur in getting up a true case, [*Midgley v. Wood* (4)], or even if the facts suppressed, though pertinent and material, would not have been sufficient to establish the counter-charge: *Hunt v. Hunt* (3). Similarly, it was ruled in *Churchward v. Churchward* (5), that if the initiation of a divorce suit be procured and its conduct provided for by agreement (specially if abstention from defence be a term), this constitutes collusion, although it does not appear that any specific fact has been falsely dealt with or withheld. It is impossible to bring the present case within the principle thus enunciated, because there was no compact not to defend, and there was no intention to conceal material facts from the Court.

As regards desertion without excuse, the contention is based on the circumstance that the petitioner had

(1) (1890) 15 P. D. 66.

(4) (1860) 30 L. J., P. & M. 57.

(2) (1877) 25 W. R. (Eng.) 560.

(5) [1895] P. 7.

(3) (1877) 47 L. J., P. & M. 22; 39 L. T. 45.

deliberately abstained from marital intercourse with the respondent for 9 years without any reason to justify such conduct on his part. Reference has been made to the decision in *Synge v. Synge* (1), in support of the proposition that refusal of marital intercourse without excuse constitutes desertion in law. In my opinion, this contention is too broadly formulated and is not supported by the decision mentioned. In that case, the wife refused to submit to marital intercourse with her husband; he left her in consequence and subsequently committed adultery. The wife then petitioned for divorce on the ground of adultery and desertion. The Court refused the petition for dissolution of marriage. Sir Francis Jeune held in substance that a wife who, without cause, refuses to permit marital intercourse to her husband, cannot allege desertion without reasonable cause by him, if in consequence he refuses to live with her. It is important to remember that under section 27 of the Matrimonial Causes Act, 1857, it is necessary for the wife when she petitions for dissolution of marriage to prove adultery coupled with desertion without reasonable excuse on the part of the husband. No doubt, there are observations in the judgment which may tend to support the view that the wife is herself in such circumstances guilty of desertion without reasonable excuse; but I do not think the judgment can be taken as an authority for the broad principle that refusal of marital intercourse without excuse constitutes by itself desertion in law sufficient to justify a decree for dissolution of marriage. The question now in controversy has been the subject of elaborate investigation by the Courts of the United States and has led to considerable divergence of

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(1) [1900] P. 180 ; [1901] P. 317.

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judicial opinion upon the construction of statutes of substantially the same scope as the Matrimonial Causes Act, 1857 and the Indian Divorce Act, 1869. The prevailing view is that the term desertion as used in the Divorce Statutes does not include the mere unreasonable refusal of one spouse to have with the other matrimonial intercourse which, in the words of Bigelow C. J., in *Southwick v. Southwick* (1), "would be merely a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract": *Fritz v. Fritz* (2), *Pfannehecker v. Pfannehecker* (3), *Reynolds v. Reynolds* (4). Typical statements of the conflicting views may be found in the judgments of Peters C. J. in *Stewart v. Stewart* (5) and of McGill Ch. in *Watson v. Watson* (6). The view of Peters C. J. amplified is that marriages were encouraged (by Ecclesiastical Law) for reasons of public policy and morality. If one party was impotent, that is, incapable of sexual intercourse, the marriage was held voidable, for the other party was not to be held in an unnatural relation, repugnant to sex, injurious to health and promotive of adultery. In our age and country, marriage is encouraged for the propagation of the race and the nurture and education of children in a house as well as the prevention of licentiousness; and the State has no active interest in preserving a marriage where these ends and purposes are defeated.

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| (1) (1867) 97 Mass. 327 ;
93 Am. Dec. 95. | (4) (1910) 68 W. Va. 15 ;
Ann. Cas. 1912 A. 889. |
| (2) (1891) 138 Ill. 436 ; 32 A. S.R.
156 ; 14 L. R. A. 685. | (5) (1887) 78 Maine 548 ;
57 Am. Rep. 822. |
| (3) (1907) 133 Iowa 425 ;
119 A. S. R. 608 ; 12 Ann. Cas. 543. | (6) (1894) 52 N. J. Eq. 349. |

If the impotence of a party defeats the purpose of marriage, it must be conceded that a wilful, continued, and unjustifiable refusal of sexual intercourse will do so, for what is the difference to the complaining party whether the other will not or cannot consent to marital intercourse. Chancellor McGill, on the other hand, argues as follows: "It would degrade the marriage relation to hold that it is abandoned when sexual intercourse only ceases. The lawfulness of that intercourse is, perhaps, a prominent and distinguishing feature of married life, but it is not the sum and all of it. The higher sentiment and duty of unity of life, interest, sympathy and companionship have an important place in it, and the thousand ministrations to the physical comforts of the twain, by each in his or her sphere, in consideration of the marriage obligation and without ceaseless thought of pecuniary recompense, fills it up. These latter factors may possibly to some extent exist in other relations of life but not in completeness. They are necessary to the perfect marriage relation. My opinion is that our statute means that divorce may be had when substantially all of the duties and amenities shall have been abandoned by the guilty party, wilfully, continuedly and obstinately for two years and not until then. In other words, the desertion must be complete, not partial; and when the party accused remains in discharge of any duties which rise in value above mere pretence and form, the desertion which the statute contemplates does not exist; that is, the deserted party must be deprived of all real companionship and every substantial duty which the other owes to him or her." Upon a careful consideration of these conflicting views, I am unable to accept the conclusion that a mere refusal of the matrimonial bed constitutes desertion and furnishes adequate

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ground for dissolution of marriage, though text-writers of repute have strenuously maintained that position. (Bishop's New Commentaries on Marriage, Divorce and Separation, Vol. I sections 1676-1686 ; Nelson on Divorce, Vol. I section 71). I hold accordingly that the plea of desertion as a bar cannot be supported.

As regards the plea of wilful neglect or misconduct such as has conduced to the alleged adultery, the contention is based on the ground that when a husband has refused marital intercourse to his wife without reason, his conduct may be deemed to conduce to her adultery. Reference has been made in this connection to the decision in *Dixon v. Dixon* (1). But, there is weighty authority, based on obvious good sense, against this view. I need refer only to the decision of Sir Francis Jeune in *Synge v. Synge* (2), where he quoted with approval the well-known observation of Lord Stowell in *Forster v. Forster* (3) that "this species of malicious desertion is a ground of divorce in some countries certainly not so here, and still less will it justify a wife in a resort to unlawful pleasures that lawful ones are withdrawn." This is consistent with the observation of Sir C. Creswell in *Rowe v. Rowe* (4): "there is no doubt, after the case of *Orme v. Orme* (5), that although this Court enforces conjugal cohabitation, it does not pretend to enforce marital intercourse; the reasons why it does not embark in such an attempt are sufficiently obvious." I hold accordingly that the conduct of the husband in this case cannot be held to have been such as conduced to the misconduct of the wife. This plea like the others must be overruled as unsustainable.

(1) (1892) 67 L. T. 394.

(3) (1790) 1. Hagg. Con. 144.

(2) [1900] P. 180.

(4) (1865) 4 Sw. & Tr. 162.

(5) (1824) 2 Addams 382.

On these grounds I agree that the decree *nisi* must
be confirmed and this appeal dismissed.

O. M.

Appeal dismissed.

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Attorneys for appellant, *Mitter & Bural.*

Attorneys for respondent, *Orr, Dignam & Co*

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Code, 1882, they could not obtain on this appeal a decree for accounts for the whole period of the agency, but they were entitled to the restoration of the order of the Subordinate Judge for accounts for the longer period. *NOBIN CHANDRA BARUA v. CHANDRA MADHAB BARUA*, (1916) I. L. R. 44 Calc. 1

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An administration suit by a creditor is an action for account within the meaning of s. 7 (iv) (f) of the Court Fees Act. In such a suit the plaintiff is entitled to place his own valuation on the relief claimed. On the analogy of section 11 of the Court Fees Act, after the preliminary decree has been made in a creditor's suit for administration and the other creditors have been invited to establish their claim, if any, against the debtor, each creditor who puts forward a claim not already transformed into a judgment debt, may well be required to pay court-fees <i>ad valorem</i> on his application, as if it were a plaint in a suit for the recovery of the sum he claims. The valuation for the purpose of jurisdiction must be identical under s. 8 of the Suits Valuation Act, with the valuation for the purpose of court-fees. Where a suit is valued on the basis of the claim of the plaintiff and instituted in the Court of the lowest grade of pecuniary jurisdiction and a claim is thereafter preferred by a creditor, who could, in respect of his claim, institute a suit only in a Court of higher grade, the remedy will be the transfer of the suit at that stage from the Court of the lowest grade to the	

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— to Privy Council : Value of property, whether at date of institution of suit, or final decree—Whether plaintiff debarred from proving real value of property—Civil Procedure Code (Act V of 1908), s. 110. The point of time to be considered (as to the value of the property) under the second paragraph of section 110 of the Code of Civil Procedure, is the date of the judgment or final order under appeal to the Privy Council. <i>Allan v. Pratt</i> , L. R. 13 A. C. 780, <i>Macfarlane v. Leclaire</i> , 15 Moo. P. C. C. 181, <i>Mohideen v. Pitchay</i> , [1893] A. C. 193, <i>Dalgleish v. Damodar Narain</i> , I. L. R. 33 Calc. 1286, <i>Bank of New South Wales v. Owston</i> , L. R. 4 A. C. 270, <i>Gooroopershad v. Juggut Chunder</i> , 8 Moo. I. A. 166, <i>Moti Chand v. Ganga Pershad</i> , I. L. R. 24 All. 174 ; L. R. 29 I. A. 40, and <i>Nand Kishore Singh v. Ram Gulam Sahu</i> , I. L. R. 39 Calc. 1037, referred to. The question whether a tenancy is to be regarded as one at will or one of a permanent nature, is a matter in which a substantial question of law is involved. <i>Mahuram v. Telamuddin</i> , 15 C. L. J. 220, and <i>Raja Mukund Deb v. Gopi Nath Sahu</i> , 21 C. L. J. 45, referred to. Where the plaintiff brought his suit in the Munsif's Court and paid court-fees on the annual rental of Rs. 4-4, he is not debarred from subsequently raising the point that the property in dispute was in fact of the value of		—, warrant to : See HABEAS CORPUS ...	459
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Court at Murshidabad for execution. On 13th June 1902, application was made for execution of the decree of 1896, and the proceedings became execution case 8 of 1902; and the execution of the decree of 1901 commenced as above as execution case 16 of 1907. *Held* by the Judicial Committee (reversing the decision of the High Court), that on the evidence and under the circumstances of the case the appellants (plaintiff) had the better title. The deeds in her favour were not antedated as alleged, and there was no fraudulent transfer to her within the meaning of section 53 of the Transfer of Property Act (IV of 1882). The preferring of one creditor to another by the judgment-debtor did not make the transfer a fraudulent one. A debtor, for all that is contained in section 53, may pay his debts in any order he pleases, and may prefer any creditor he chooses. Nor was the private alienation to the appellant void under section 276 of the Civil Procedure Code, 1882, as having been made during the continuance of an attachment. The respondent's title rested entirely on the attachment in the execution case 16 of 1907, and that alone was the attachment the continuance of which could avoid the appellant's private alienation; but on the facts it did not do so. The respondent could not invoke the attachment in execution case 8 of 1902 to defeat the alienation to the appellant which was made in different execution proceedings. Nor could he with its aid rely on section 295 of the Civil Procedure Code, 1882, as entitling him to the benefit of section 276. There were no assets in Court which was essential if section 295 were invoked, and the only attachment within the meaning of section 276 was that in execution case 16 of 1907 which

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he could not employ against the appellant. *Sorabji Edulji Warden v. Gobind Ramji*, I. L. R. 16 Bom. 91, referred to. *MINA KUMARI BIBI v. BIJOY SINGH DUDHURIA*, (1916) I. L. R. 44 Cal. ... 662

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The only difference caused by the adoption of the presumption is that we have now a definite rule of evidence, a crystallized mode of proof. <i>Dhanput Singh v. Gooman Singh</i> , (1864) W. R. Gap., Act X, 61, <i>Gopz Mohun v. Sibchunder</i> , 1 W. R. 68, <i>Sarat Chandra v. Ratubuddin</i> , 16 C. L. J. 271, <i>Cogdell v. Railway Co.</i> , 132, N. C. 852, followed. The fact that a tenancy had been subdivided into two tenancies before the Bengal Tenancy Act, would not prevent the application of sub-section (5) of section 5 in determining the character of the tenancy. The tenure was divisible, and the fact of subdivision was not a breach of its continuity. Each fragment carved out of the original tenure retained its incident. <i>Adit v. Sukhraj</i> , 17 C. L. J. 435, <i>Chandra Kanta v. Ram Krishna</i> , 20 C. W. N. 1002, followed. Proof of the purpose of the original grant determines the real nature of the tenancy. <i>Durga v. Kalidas</i> , 9 C. L. R. 449, <i>Promotho Nath Kumar v. Nilmoni Kumar</i> , 14 C. L. J. 38, <i>Promoda Nath Roy v. Asir-uddin Mandal</i> , 15 C. W. N. 896, followed. <i>Mahabir v. Fox</i> , 9 C. L. J. 467, <i>Buzbul Karim v. Satish Chandra</i> , 13 C. L. J. 418, <i>Nityananda v. Nanda Kumar</i> , 13 C. L. J. 415, <i>In re School Board Election for Parish of Pulborough</i> , [1894] 1 Q. B. 725, <i>In re Athlumney</i> , [1898] 2 Q. B. 547, <i>Main v. Stark</i> , 15 App. Cas 384, <i>Reynolds v. Attorney-General</i> , [1896] A. C. 240, <i>Bengal Indigo Company v. Raghobur Das</i> , I. L. R. 24 Calc. 272, referred to. <i>Makaram Chaprasi v. Telam-uddin Khan</i> , 15 C. L. J. 220, distinguished. <i>JAGABANDHU SHAHA v. MAGNAMOYI DASSEE</i> (1916) I. L. R. 44 Calc. ...	555
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Bengal Tenancy Act (VIII of 1885), s. 109—its scope and operation. To attract the operation of section 109 of the Bengal Tenancy Act, it is essential to establish that the civil suit has for its subject a matter which has already formed the subject of an application under s. 105. The introduction of s. 105A has not altered the scope of s. 109 which must be construed on the same lines as before the introduction of s. 105A. It cannot be held under s. 109 that a matter has been the subject of an application under s. 105 whenever it might, if the defendant had so chosen, have been raised and decided under s. 105 read with s. 105A. To hold that would be to read into s. 109 words which are not there. <i>Pandab Dowari v. Ananda Kisun</i> , 14 C. W. N. 897, <i>Sashi Bhusan v. Eshabar Ali</i> , 19 C. W. N. 636, <i>Sasi Bhusan Hazra v. Asvini Kumar Samanta</i> , 19 C. W. N. 637 (n), referred to. <i>NAWAB BAHADUR of MURSHIDABAD v. AHMAD HOSSEIN</i> (1916), I. L. R. 44 Calc. ...	783
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Bond—Alteration in good faith, consonant to original intention of the parties—Instrument, whether vitiated thereby. Where a mortgage was in terms one rupee per mensem on a loan of Rupees 200, and the mortgagee inserted the words "per cent," in the bond while in his possession, thus altering the interest from eight annas per cent. per mensem to one rupee per cent.	

Bond—*concl.*

per mensem; and it was found that there had been no fraud, and that it was the common intention of the parties that interest was to be paid at the rate of one rupee per cent. *Held*, that an alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument. *ANANDA MOHAN SHAHA v. ANANDA CHANDRA NAHA* (1916) I. L. R. 44 Calc. ...

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Burmese Law—Inheritance—Right of eldest son in a family to a share of the estate on the death of the father—Right of election to take share or not—Limitation Act (IX of 1908), Sch. I. Art. 123—Manu Kyay, Book X, Rules 5 and 14. By the Burmese Buddhist law of succession laid down in the Manu Kyay, Rule 5 of Book X, the eldest son in a family takes on the death of the father a definite one-fourth share of the estate, a right which he is at liberty to assert within any period not outside that fixed by Art. 123, Seb. I of the Limitation Act of 1908, as the period within which a claim must be made for a share of property on the death of an intestate. There is no authority to the effect that the eldest son has merely a right to elect within a certain limited period whether he will take the share of the property or not. <i>MAUNG TUN THA v. MA THIT</i> , (1916) I. L. R. 44 Calc. ...	376
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Chaukidari Chakaran Lands—*Zamin-dar's title to such lands when transferred to him by Collector under s. 50 of the Village Chaukidari Act (Beng Act VI of 1870) after their resumption by Government—Bengal Permanent Settlement, 1793—Bengal Regulations I of 1793, s. 8, cl. (4) and VIII of 1793, ss. 36 to 41—Putnidar's right to such lands under putni grant—Preservation of rights of third parties (by s. 51 of Beng. Act VI of 1870).* The suits which gave rise to this appeal were brought to recover khas possession from the appellant, the registered proprietor of extensive zamindaris in the Birbhum District of Bengal, of chaukidari chakaran lands resumed by Government and transferred to him under the provisions of the Village Chaukidari Act (Beng. Act VI of 1870). The plaintiff in each suit (respondents) was the putnidar or dar-putnidar of village within the boundaries of which the land in each suit was situated. It was objected that the appellant had no such interest in the chaukidari chakaran lands as could be conveyed in a putni lease. *Held* (on a consideration of the nature of chaukidari chakaran lands, the provisions of the Bengal Permanent Settlement of 1793, the Regulations of that time so far as they deal with chakaran lands, and the true meaning and effect of Bengal Act VI of 1870), that the zamindar obtained or retained in the chaukidari chakaran lands situate within the territorial boundaries of a village comprise in his zamindari an interest capable of being made the subject of a putni lease. The settlement of 1793 recognises and proceeds on the footing that the zamindars are the actual proprietors of the land for which they undertake to pay the Government revenue; and it is clear that since the settlement they have had a *prima facie* title to all lands for which they pay revenue,

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such lands being commonly referred to as malguzari lands: see *Perhlad Sein v Doorga Persaud Tewaree*, 12 Moo. I. A. 289. On the Regulations of the Permanent Settlement the leading authority is *Joykissen Mookerjee v. Collector of East Burdwan*, 10 Moo. I. A. 16, in which Lord Kingsdown said that the effect of the settlement was to divide chakaran lands into two classes, *viz.*, thanadari chakaran lands, that is, land held on service tenure by police officials, and all other chakaran lands. The former class were, by Bengal Regulation I of 1793, section 8, clause 4, made resumable by Government, the Government relieving the zamindars from the duty of maintaining a police establishment. These lands were in fact shortly afterwards resumed, and became Government lands, the title of the zamindars being extinguished by such resumption. As to all other chakaran lands, whether held by public officers or private servants in lieu of wages, they are dealt with by Regulation VIII of 1793, section 41. From sections 37 to 41 inclusive it appears that, whatever may be the case with regard to the private lands of the zamindars, or with regard to chakaran lands the services for which were purely personal to the zamindar, it was clear that thanadari and chaukidari chakaran lands, the services for which involved the performance of duties in which the public was interested, had not as a rule been taken into account for the purpose of increasing the revenue. The effect of a resumption by the Government of chaukidari chakaran lands under the provisions of Bengal Act VI of 1870 is that after the assessment is complete the Collector is under section 50, by order in the scheduled form to transfer to the zamindar subject to such assessment; and by section 51

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such order operates to transfer the land to the zamindar "subject to all contracts thereby made in respect of, under, and by virtue of which any person, other than the zamindar, may have any right to any land; portion of his estate or tenure in the place in which such land may be situate." Those words are wide enough to include, and in their Lordships' opinion do include, the rights of a putnidar under a putni grant by virtue of which the putnidar is lessee of the zamindar's interest in the lands resumed, and also the rights of dar-putnidar under a dar-putni grant. Not only therefore does the Act recognise the existing title of the zamindar to the lands resumed but the estate taken by the zamindar under the order of transfer is in confirmation and by way of continuance of his existing estate, and when the zamindar or those through whom he claims has or have entered into contracts affecting his existing estate, the rights of third parties under those contracts are preserved. <i>RANJIT SINGH BAHADUR v. KALI DAS DEBI</i> , (1917) I. L. R. 44 Calc. 841	
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Common Manager—Bengal Tenancy Act (VIII of 1885), s. 95—<i>Suit for general account after release of estate.</i> Where a Common Manager appointed under s. 95 of the Bengal Tenancy Act resigned and the estate was released, and where it was found that his account had not been properly rendered and passed by the District Judge:—<i>Held</i>, that he could be sued for account with the permission of the District Judge. <i>Naba Kishore Mandal v. Atul Chandra Chatterji</i>, I. L. R. 40 Calc. 150, distinguished. <i>DURGA PRASANNA ROY v. ISHAN CHANDRA SHAHA</i> (1916), I. L. R. 44 Calc. ...	800

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Calcutta Municipal Act (Beng. III of 1899), ss. 341, 617—Fixtures erected on buildings before 1st June 1863—Assessment of compensation not a condition precedent to demolition of fixtures—Small Cause Court as a Special Tribunal for determination of compensation—Amount of claim exceeding ordinary jurisdiction of Small Cause Court—Suit not cognisable by Subordinate Judge—Decree correct in substance but not in form—Costs. In s. 341 of the Calcutta Municipal Act (Beng. III of 1899) which in respect to fixtures erected on buildings "before 1st June 1863" enacts that "the Corporation shall make reasonable compensation to every person who suffers damage by the removal or alteration of the fixtures," there is nothing that renders the assessment of compensation a condition precedent to the demolition of the fixtures. Until the removal is effected no damage at all is in fact suffered. Section 617, "where . . . any municipal authority . . . is required by . . . this Act to pay . . . compensation, the amount to be so paid, and if necessary the apportionment of the same shall in case of dispute be determined . . . by the Court of Small Causes," includes a claim for compensation by a person against the Corporation for removal of fixtures, although the amount exceeds the ordinary jurisdiction of the Small Cause Court. In a suit in the Court of a Subordinate Judge by the appellants against the Corporation for compensation for removal of fixtures, they prayed for (a) a declaration that the fixtures in dispute had been erected before 1st June 1863; (b) that they were entitled to compensation for the loss they would suffer by their

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compulsory removal; (c) that the Corporation could not remove the fixtures until reasonable compensation had been paid; (d) asked the Court to fix the amount of compensation; and (e) for an injunction restraining the Corporation from interfering with the fixtures until compensation was paid. The Subordinate Judge decreed the suit giving compensation. It was dismissed, as being premature (under section 341) and not cognisable by the Subordinate Judge (under section 617), by the High Court where the Corporation, though they had denied the fact in their written statement, admitted that the fixtures had all been erected before 1st June 1863:—*Held*, by the Judicial Committee, that the decree of the High Court though correct in substance was incorrect in form and their Lordships amended it by adding to it declarations that the appellants were entitled to relief in terms of (a) and (b) of the prayer of their plaint, the rest of the suit remaining dismissed. *JOSEPH v. CORPORATION OF CALCUTTA* (1916) I. L. R. 44 Calc. ... 87

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Counterfeit Coin—Possession—Custody —“To become possessed,” whether “conscious possession”— <i>Possession with knowledge—Penal Code (Act XLV of 1860), ss. 7, 27, 243—Misdirection—Review—Powers of High Court—Letters Patent, 1865, cl. 26—Criminal Procedure Code (Act V of 1898), s. 537. Per CURIAM.</i> To constitute an offence under s. 243 of the Penal Code, it is essential to prove that at the time the accused became possessed	

Counterfeit Coin.—contd.

of the coin he knew it to be counterfeit, whether he was in possession of the coin himself, or his wife, clerk or servant was in possession of the coin on his account. As there was a misdirection to the jury in a part of the Judge's summing up which related to a material and essential element of the charge, the conviction should be set aside in review under cl. 26 of the Letters Patent. *Per MOOKERJEE J.* The term “possession” has to be interpreted in the light of s. 27, Indian Penal Code, which by virtue of s. 7 is applicable wherever the term is used in the Code. Section 27 abolishes the distinction recognised in English law between possession and custody. Section 537 of the Criminal Procedure Code has no application to a case reviewed under cl. 26 of the Letters Patent. Mere non-direction is not necessarily misdirection. *Rev. v. Stoddart*, 2 Cr. App. Rep. 217, followed. The Judge's note of his charge to Jury is conclusive. *King Emperor v. Upendra Nath Das*, 21 C. L. J. 377; 19 C. W. N. 653, referred to. *Per FLETCHER J.* The point of time to be considered was the time when the accused had actual or conscious possession of the counterfeit coins for determining whether he had knowledge at the time that the coins were spurious. *Per CHAUDHURI J.* There is a clear distinction in Law between “custody” and “possession.” Custody means possession on account of another. Section 27, Indian Penal Code, does not express the complete thought of the Legislature on the question of possession, and it is competent to Court to interpret the words “to become possessed” in accordance with the meaning that the general law has given to them. *In re Proceedings*, 22nd December,

Counterfeit Coin.—concl'd.

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— <i>Inheritance—Customs among tribal communities in the Panjab—Agnates—General custom excluding daughters, exceptions to—Succession of daughter when married to near collateral who is in her farther's house as khana-damad (resident son-in-law)—Riwaj-i-am or official record of customs, value of, as evidence. A Mahomedan Jat belonging to the sub-community of Dabs settled in the Jhang District of the Panjab, died without male issue, and leaving a widow and a daughter who was married to a near collateral of the deceased who was also his khana-damad or resident son-in-law. In a suit by the respondents who as collaterals based their claim to a share of the property of the deceased on a general custom of agnatic succession in the community or tribe to the exclusion of the daughter and her descendants, the appellant, the son of the daughter of the deceased who was the devisee of his will, alleged that a daughter married to a near collateral who takes up his residence in the father-in-law's house as a khana-damad, succeeded to her father's inheritance in preference to the agnatics, and produced in support of this special custom the Riwaj-i-am or official records of custom in addition to a considerable amount of oral testimony. Held (reversing the decision of the Chief Court), that on the death of the widow who had inherited the entire estate, the daughter and her son were entitled to succeed in preference to the respondents. Assuming that such a general custom as that relied on</i>	

Custom—concl'd.

by the respondents existed, as to which the decisions of the Punjab Chief Court were by no means uniform, specially in the case of Mahomedan tribes who were endogamous, it was clear that the rule was admittedly subject to many exceptions : see Rattigan's "Digest of Customary Law for the Punjab," Chapter II, paragraph 23, where they are enumerated ; and Roe's "Tribal Law in the Punjab," where particular stress is laid on the value of the Riwaj-i-am as a record of tribal customs and it is said that "a son-in-law of the house is a regular institution." *Held*, also, that the Riwaj-i-am was a public record prepared by a public officer in discharge of his duties and under Government rules, and was clearly admissible in evidence to prove the facts therein entered subject to rebuttal. And their Lordships were of opinion that the statements in the Riwaj-i-am for the Jhang District formed a strong piece of evidence in support of the custom set up by the appellant, which it lay upon the respondents to rebut, and they had failed to do so. *BEG v. ALLAH DITTA*, (1916) I. L. R. 44 Calc. ... 749

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— *Appeal—Dismissal for default—Merger—Civil Procedure Code (Act V of 1908), s. 2 (2) ; O. XXI, r. 22—Omission to give notice under O. XXI, r. 22, effect of—Bengal Tenancy Act (VIII of 1885), s. 155 (3)—Extension of time under s. 155 (3). The original decree is merged*

Decree—contd.

in the appellate decree whether the latter confirms, amends or reverses the original decree, and it is the appellate decree alone which can be executed: *Abdul Rahiman v. Maidin Sai'a*, I. L. R. 22 Bom. 500, *Chandrakant v. Lashman*, 24 C. L. J. 517, referred to. But this doctrine cannot be applied where the appeal is dismissed for default. In such a case the appeal fails for non-prosecution, and it cannot be said that the Court of Appeal adopted the decree of the Primary Court. The judgment of the lower Court, therefore, is the judgment to be enforced. *Bipro Das v. Chunder Seekur*, 7 W. R. 521, referred to. Section 2 (2) of the Code of Civil Procedure, 1908, expressly provides that any order of dismissal for default is not a decree. The notice prescribed by section 248 of the Code of Civil Procedure now replaced by Order XXI, rule 12, is necessary in order that the Court may obtain jurisdiction to proceed against the property of the judgment-debtor by way of execution. The omission to give notice as required by the rule is not a mere irregularity which makes the proceedings voidable but is a defect which goes to the very root of the proceedings and renders it void for want of jurisdiction. *Gopal Chander v. Gunamani Dasi*, I. L. R. 20 Calc. 370, *Sahdeo Pandey v. Ghasiram*, I. L. R. 21 Calc. 19, *Parashram V Balmukund*, I. L. R. 32 Bom. 572, referred to. Section 155 of the Bengal Tenancy Act enables the Court to give the tenant relief on the footing that there shall be no forfeiture at all when relief is granted; the forfeiture is stopped *in limine*, so that there is no question of any destruction of an interest which has to be called into existence again. It is competent to the Court to entertain an application for extension of the period fixed by the

Decree—contd.

decree for the performance thereof under section 155 (3) of the Bengal Tenancy Act. Whether an order for extension of time should be made or not, depends upon the circumstances of the litigation, *i.e.*, upon the circumstances disclosed at the original trial and the events subsequent. *Sinraman v. Sham Charan*, 16 C. W. N. 1090; 16 C. L. J. 520, referred to. *SHYAM MANDAL v. SATINATH BANERJEE* (1916) I. L. R. 44 Calc. ...

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—Court executing the decree cannot go behind the decree—*Remedies of the aggrieved party—Practice.* The Court, executing the decree, must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree. The validity of a decree cannot be questioned in execution proceedings on the ground that as the lunatic plaintiff was not properly represented by a competent next friend in the suit, no decree for costs could have been made against him. A proceeding to enforce a judgment is collateral to the judgment, and, therefore, no enquiry into its regularity or validity can be permitted in such a proceeding. On this principle it can properly be held that a judgment against a person who was *non compos mentis* at the time of the trial and yet was not represented by a legal guardian, is not to be impeached in execution, but should be reversed or annulled in some direct proceeding taken for that purpose. Such a judgment can be attacked, for instance, by way of an application for review to the Court which made it, by way of an appeal or application for revision to a superior tribunal or by way of a regular suit in a Court of competent jurisdiction, but the Court which made the decree cannot when called upon to execute it, be invited to hold that the decree was erroneously or improperly made.

Decree—concl'd.

<i>Rashid-un-nisa v. Muhammad</i> , I. L. R. 31 All. 572 ; L. R. 36 I. A. 168, followed. <i>Papamma Rao v. Vira Pratapa</i> , I. L. R. 19 Mad. 249 ; L. R. 23 I. A. 32, <i>Grish Chunder Lahiri v. Shoshi Shikhareswar</i> , I. L. R. 27 Calc. 951 ; L. R. 27 I. A. 110, <i>Hassan Ali v. Gauzi Ali</i> , I. L. R. 31 Calc. 179, <i>Rashbehari v. Joyanda</i> , 4 C. L. J. 475, <i>Shib Lukshan v. Tarangini</i> , 8 C. L. J. 20, <i>Madan Mohan v. Bhikar Sahu</i> , 16 C. L. J. 517, <i>Ram Nath v. Basanta Narain</i> , 18 C. L. J. 209, <i>Ramphal Rai v. Ram Baran Rai</i> , I. L. R. 5 All. 53, <i>Muttia v. Virammal</i> , I. L. R. 10 Mad. 283, <i>Venkatachala Reddi v. Venkatarama Reddi</i> , I. L. R. 24 Mad. 665, <i>Appa Rao v. Krishna Ayyangar</i> , I. L. R. 25 Mad. 537, <i>Sheik Budan v. Ram Chandra</i> , I. L. R. 11 Bom. 537, <i>Prasanna Kumari Debi v. Sris Chandra</i> , 22 C. L. J. 551, <i>Chhoti Narain Singh v. Rameshwar</i> , 6 C. W. N. 796, <i>Khizarajmal v. Daim</i> , I. L. R. 32 Calc. 296 ; L. R. 32 I. A. 23, <i>Radha Prasad Singh v. Lal Sahab Rai</i> , I. L. R. 13 All. 53 ; L. R. 17 I. A. 150, <i>Janardhan v. Ram Chandra</i> , I. L. R. 26 Bom. 317, <i>Imlad Ali v. Jagan Lal</i> , I. L. R. 17 All. 478, <i>Subramania v. Vaithinatha</i> , I. L. R. 38 Mad. 682, <i>Gomatham v. Komandur</i> , I. L. R. 27 Mad. 118, <i>Amichand v. Collector of Sholapur</i> , I. L. R. 13 Bom. 234, <i>Geereeballa v. Chunder Kant</i> , I. L. R. 11 Calc. 213, <i>Devkabai v. Jefferson</i> , I. L. R. 10 Bom. 248, <i>Rama Prosad v. Anukul Chandra</i> , 20 C. L. J. 512, <i>Pasumarti v. Ganti</i> , 28 Mad. L. J. 525, <i>Arjun Das v. Gunendra Nath</i> , 20 C. L. J. 341, <i>Chuck v. Cremer</i> , 2 Phil. 113, <i>Jaigobind v. Patesri Partap Narain Singh</i> , 27 All. W. N. 286, referred to. <i>KALIPADA SARKAR v. HARI MOHAN DALAL</i> (1916) I. L. R. 44 Calc. ... 627	
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Divorce—Husband and wife—Petition by husband—Adultery—Condonation—Collusion—Conduct conducing to adultery—Desertion—Divorce Act (IV of 1869), ss. 12, 13, 14. Condonation is a conclusion of fact, not of law, and means the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven. The forgiveness which is to take away the husband's right to a divorce must not fall short of reconciliation and this must be shown by a re-instatement of the wife in her former position which renders proof of conjugal cohabitation with restitution of conjugal rights necessary. Collusion is held to exist where the initiation of the proceeding for dissolution of marriage is procured and its conduct (especially if abstention from defence be a term) provided for by agreement or bargain between the spouses or their agents, although it does not appear that any specific fact has been falsely dealt with or withheld. The mere fact that the husband refused marital intercourse to the wife by itself is not such wilful neglect or misconduct as conduced to the adultery ; nor can the fact	

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that the parties went their own way in the sense that they had their own friends and interests, he said to be conduct conducing to adultery, even when coupled with the abstinence by the husband from marital intercourse. The fact that the husband had abstained from marital intercourse without reasonable cause and that the parties went their own way in the sense that they had their own friends and interests, would not justify a finding of desertion on the part of the petitioner. <i>STE. CROIX v. STE. CROIX</i> (1917) I. L. R. 44 Calc. ...	1091	Election, right of: See BURMESE LAW... 379	
— <i>Suit against wife—Wife found guilty of adultery—Decree nisi on husband's petition—Appeal—Wife's costs, application for—Liability for husband—Practice and procedure.</i> Where the wife has been herself found guilty of adultery by the Court of first instance and then actively brings the matter before the Court on appeal, the husband cannot be justly called upon by her as a matter of right to provide for her costs. <i>Robertson v. Robertson</i> , 6 P. D. 119, <i>Otway v. Otway</i> , 13 P. D. 141. <i>Holt v. Holt</i> , 28 L. J. (P. & M.) 12, referred to. <i>Per</i> Mookerjee J. It is plain, however, that the doctrine in question is an encroachment upon the ordinary rule that costs follow the event, and, speaking for myself, I am of opinion that every attempt to extend its operation should be cautiously scrutinised. <i>STE. CROIX v. STE. CROIX</i> (1916) I. L. R. 44 Calc. ...	35	Emergency Legislation: See HABEAS CORPUS ... 459	
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		— Will by Hindu mother, in favour of daughter and then to son's son, if any—Legatee estopped from denying title of remainderman—Adverse possession, if any. Where a Hindu mother purported to bequeath her husband's property to her daughter with a proviso that if male children should be born to her (testatrix's) son (who survived her) they should succeed to the whole estate, and the daughter entered into possession under the will and carried out all its provisions. In a suit brought by the purchaser from the son's son against the purchaser from the daughter's son:— <i>Held</i> , (i) that the will was invalid because the testatrix had no interest of which she could dispose by will, and it further contained an ineffectual bequest to unborn grandsons; (ii) that the daughter (legatee) and her successor in title by her acceptance of the will were estopped from disputing the title of the son's son (remainderman); and (iii) that the principle that a person who accepts a position conferred on him or her by a will cannot at the same time repudiate so much of the will as conveys an interest to another person, governed the case. <i>Boord v. Boord</i> , L. R. 9 Q. R. 48, and <i>Rupchand Ghose v. Sarbeshur Chandra Ghader</i> , 3 C. L. J. 629 referred to. <i>DURGA DAS KHAN v.</i>	

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Evidence—Admissibility—Conversation between defendant and plaintiff's pleader when suit in contemplation, if admissible in evidence—Admission made by one defendant evidence against all others—Evidence Act (I of 1872), ss. 18, 23. In a suit for rent, there was a talk of settlement between the plaintiff's pleader and one of the defendants when the suit was about to be instituted. <i>Held</i> , that the mere fact of the conversation taking place when the parties were contemplating that a suit might be instituted is not in itself sufficient to prevent the conversation from being put in evidence. <i>Wallace v. Small</i> , (1830) Moo. & M. 446, <i>Watts v. Lawson</i> , (1830) Moo. & M. 447n. <i>Nickolson v. Smith</i> , 3 Starkie 128, <i>Harding v. Jones</i> , (1835) T. & G. 135, and <i>Jorden v. Money</i> , 5 H. L. C. 185, relied on. <i>Mohabeer Singh v. Dhujjoo Singh</i> , 20 W. R. 172, discussed. When several persons are jointly interested in the subject-matter of a suit, an admission by one of them is receivable in evidence not only against himself, but also against the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. <i>Kowsulliah Sundari Dasi v. Makta Sundari Dasi</i> , I. L. R. 11 Calc. 588, <i>Chalho Singh v. Jharo Singh</i> , I. L. R. 39 Calc. 995, and <i>Ahinsa Bili v. Abdul Kader Saheb</i> , I. L. R. 25 Mad. 26, referred to. <i>Kali Kisore Chowdhury v. Gopi Mohan Roy Chowdhury</i> , 2 C. W. N. 166, distinguished. <i>MEAJAN MATBAR v. ALIMUDDI MIA</i> (1916) I. L. R. 44 Calc. ...	130

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Evidence Mortgage—Deed, form of proof of—Evidence Act (I of 1872), ss. 68 to 71. In a suit on a mortgage bond the admission of execution by the sole mortgagor does not dispense with the necessity of complying with the provisions of section 68 of the Evidence Act in order to prove the execution of the document as against other parties in the suit who do not admit such execution. Such a document must be proved as against them in accordance with the provisions of sections 68, 69 and 71 of the Evidence Act. <i>Jogendra Nath Mukhopadhyaya v. Nitai Churn Bundopadhyaya</i> , 7 C. W. N. 384, distinguished. <i>SATISH CHANDRA MITRA v. JOGENDRA NATH MAHALANABIS</i> (1916) I. L. R. 44 Calc. ...	345
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Execution of Decree—Procedure—Practice—Rival decree-holders—Assets in the hands of Registrar—Attachment of fund with Accountant-General—Anticipatory attachment—Priority—Rateable distribution—Civil Procedure Code (Act V of 1908), s. 73 ; O. XXI, r. 52. A question of rateable distribution under s. 73 of the Code of Civil Procedure of 1908 arises amongst creditors where the application for execution has been made before the receipt of assets. Order XXI, r. 52, does not allow of an anticipatory attachment of money expected to reach the hands of a public officer and is restricted only to money actually in his hands. Where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to	

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preferential treatment by reason of the priority of his attachment ; as the attachments create no charge or lien upon the fund so long as the fund is in the custody of the Court, the Court is bound to apply the rules of justice, equity and good conscience, in the determination of the relative rights of the creditors who wish to proceed against the fund in <i>custodia legis</i> for the satisfaction of their dues. In such circumstances, the fund, if sufficient to meet in full the claims of the creditors, should be rateably distributed amongst them. <i>THAKURDAS MOTILAL v. JOSEPH ISKENDER</i> (1917) I. L. R. 44 Calc. ...	1072	<i>minerals</i> —Absence of express evidence that they formed part of the grant— <i>Protraction of Indian litigation.</i> A "grant" in India has not the special and technical meaning attached to the same word in English law. A Talabi Brahmittar grant of a zamindar's village at a fixed rent made before the Permanent Settlement by the then Raja of Pachete to the predecessors in title of the appellant, although found to be a permanent, hereditary and transferable tenure, was held (affirming the decision of the High Court) not to carry with it the mineral rights in the soil. Minerals will not be held to have formed part of the grant, in the absence of express evidence to that effect. <i>Hari Narayan Singh Deo v. Sriram Chakravarti</i> , I. L. R. 37 Calc. 723 ; L. R. 37 I. A. 136, and <i>Durga Prasad Singh v. Braja Nath Bose</i> , I. L. R. 39 Calc. 696 ; L. R. 39 I. A. 133, followed. Protraction of Indian litigation deprecated. <i>SHASHI BHUSAN MISRA v. JYOTI PRASAD SINGH DEO</i> (1916) I. L. R. 44 Calc. ...	585
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and ought to be rigorously construed. "Reasonable suspicion" or "credible information" upon which an arrest can be made by a police officer under section 54, must be based upon definite facts and materials placed before him, which the officer must consider for himself, before he can take any action under that section. He cannot delegate his discretion, or take shelter under another person's belief or judgment, but must act on his own personal responsibility. *Queen v. Behary Singh*, 7 W. R. Cr. 3, followed. *Uharu Chandra Mazumdar, In re*, (1916) I. L. R. 44 Calc. ...

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which is embodied in Act I of 1915 and which seeks to oust the jurisdiction of the Courts, does not offend against s. 22 of the Indian Councils Act, 1861. Act I of 1915 is not an Ordinance extended, but an Act. It does not offend against the allegiance of the subject, or the sovereignty of the Crown. It is not *ultra vires*, and this Court has no jurisdiction to call in question the orders which have been passed thereunder. It is for the Governor-General in Council to be satisfied on the materials before him. The Court cannot call for the materials to examine them. *In the matter of Rudolf Stallmann*, I. L. R. 39 Calc. 164, *Levinger v. Reg.*, L. R. 3 P. C. 282, *In the matter of Tuckut Roy*, 1 Boulnois 354. *In the matter of Ameer Khan*, 6 B. L. R. 392. *The same Case on appeal*, 6 B. L. R. 459, *Alter Kaufman v. The Government of Bombay*, I. L. R. 18 Bom. 636, *The Queen v. Burah*, L. R. 3 A. C. 889; L. R. 5 I. A. 178, and *Reg. v. Halliday*, [1916] 1 K. B. 738; 20 C. W. N. (Notes) xci referred to. Where an Act repeals a previous Act, or a certain provision thereof, and the repealing enactment is itself subsequently repealed by another Act :—*Held*, that the last repeal did not since 1850 revive the Act or provision before repealed, unless words there are reviving them. There was nothing in any of the Acts subsequent to the repealing Act (XI of 1872) which revived s. 29 of the East India Company's Act (26 Geo. III, c. 57). Where a person is detained in custody and an application is made to the Court under s. 491 of the Criminal Procedure Code :—*Held*, that the usual procedure was to issue a Rule in the first instance, and not to order the production of the petitioner. *In re Jewa Nathoo and Others*, (1916) I. L. R. 44 Calc. ... 459

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Hindu Law—Adoption—*Suit to have alleged adoption declared valid—Evidence of adoption—Absence of any deed or written record of adoption—No entries of expenditure on ceremonies in account books—Adopted Child's name not changed and child left with its natural parents.* In this appeal which arose out of a suit by the natural father of the appellant to have his adoption declared valid, their Lordships of the Judicial Committee (affirming the decision of the Court of the Judicial Commissioner of the Central Provinces) *held*, on the evidence, that the alleged adoption was never made. It appeared that though the suits might well have been brought in the life time of the alleged adoptive father, who consistently denied that the adoption ever took place, it was not commenced until some months after his death. There was no deed of adoption or any other formal record of the event. *Sootrugun Sutputty v. Sabitra Dye*, 2 Knapp P. C. 287, referred to. There was no reference to any expenditure on the ceremony in the account books of either the natural or the adoptive father. *Lal Kunwar v. Chiranjil Lal*, I. L. R. 32 All. 104; L. R. 37 I. A. 1, referred to. No feast was proved to have taken place on the occasion of the alleged adoption; the ceremonies said to have been performed were of the briefest possible description; no notification was made to the authorities; the child's name was not changed, and he was never taken to live with his

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adoptive parents, or recognised by them in any way; and all the surrounding circumstances and conditions not only did not support the adoption, but made it highly improbable that the ceremony of adoption was ever performed in regard to the appellant. *DIWAKAR RAO v. CHANDANLAL RAO*, (1916) I. L. R. 44 Calc. ... 201

Alienation—*Onus of proof of legal necessity—Recitals in deeds as to necessity—Evidence of representation to purchasers—Value of recital after lapse of time when actual proof of enquiry has become impossible—Attestation of deed, effect of, as evidence of knowledge of contents, or of consent by reversioner—Unexplained delay in prosecution of appeals—Costs disallowed, if delay due to appellants.* In a suit for property alienated by a Hindu widow in possession of her husband's estate, the burden of proving legal necessity for the alienations lies on the purchasers. *Maeshar Baksh Singh v. Ratan Singh*, I. L. R. 23 Calc. 766; L. R. 23 I. A. 57, followed. Recitals in deeds cannot by themselves be relied upon for the purposes of proving the assertions of fact which they contain. They can only be evidence as between the parties to the conveyances and those who claim under them. After a long period, however, has elapsed between the alienation and the suit to set it aside when all those who could have given evidence on the relevant points have grown old or have passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance and cannot lightly be set aside. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible the recital

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coupled with such circumstances would be sufficient evidence to support the deed. Where the total value of the estate was small and there were expenses like the husband's *shradh* and any debts against his estate, which had to be paid, besides the necessity for the maintenance of the widows which need not be measured merely by a sufficient sum to support existence, the periods at which, between 1848 and 1865, the properties were sold the small sums for which the sales were made, and the disposition of the property piece by piece with fair regularity for 16 years all went to support the view that the widows found themselves unable to provide sufficient maintenance out of the income of the estate, until their means came to an end in 1865, and the circumstances were such as would be sufficient to justify the assumption that proper enquiry would have disclosed that necessity existed. There was only the one fund for payment and if money was needed to pay debts, the amount of money available for maintenance would to that extent be reduced, and if the debts had been paid by the widows out of borrowed money it would make no difference whether the necessity to pay debts, or to maintain themselves was stated in the recitals as reason for the sale. Attestation of a deed proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed, nor affect him with notice of its provisions. If it had been quite impossible for either of the widows lawfully to dispose of any interest in the properties, and it was shown that the witness knew the nature of the deed, more value might be given to his attestation, but by itself it would neither create an

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estoppel nor imply consent. *Hari Kishen Bhagat v. Kashi Prasad Singh*, 1 L. R. 42 Calc. 876 ; L. R. 42, I. A. 64, referred to. Comments were made by their Lordships on the delay that had occurred between the decrees of the High Court in August 1909 and the setting down of the appeals for hearing in April 1916, for which no sufficient reason appeared. Unexplained, it constituted a grave reproach to the administration of justice. All the respondents had been unjustly attacked in the lawful possession of property, and for seven years had been subject to the anxiety and distress of knowing that the judgment of the High Court in their favour was subject to the inevitable uncertainties of the law. Their Lordships said that had the appeals succeeded they would have refused the appellants any costs of the appeals unless they could have cleared themselves of the imputation of having needlessly protracted the proceedings ; and that course would be taken in similar cases in the future, if occasion arose *BANGA CHANDRA DHUR BISWAS v. JAGAT KISHORE ACHARYA CHOWDHURI* (1916) I. L. R. 44 Calc. ... 186

Hire-purchase Agreement—*Agreement to hire machinery, whether conveyance or agreement—Stamp duty—Stamp Act (II of 1899), s. 2 (10), Sch. I, Art. 5, cl. (c).* A hire-purchase agreement not being an agreement to purchase but simply an agreement to hire the machinery in question with an option on the part of the hirer to purchase, comes within the meaning of Art. 5, cl. (c) of Sch. I to the Stamp Act, and is, therefore, liable to a stamp duty of eight annas. *Helby v Matthews*, [1895] A. C. 471, referred to. *LINOTYPE AND MACHINERY, LD., AND THE WINDSOR PRESS OF CALCUTTA, In re* (1916) I. L. R. 44 Calc. ... 72

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Insolvency—Practice—Presidency Towns Insolvency Act (III of 1909), s. 36, whether applications under, may be made ex parte—S. 112, rules framed there under—Rules 17, 18, 19 and 30. According to the rules framed by the Calcutta High Court under s. 112 of the Presidency Towns Insolvency Act, applications under s. 36 may be, and are intended to be made ex parte. KISSORI MOHAN ROY, In re (1916) I. L. R. 44 Calc. 286
——— Presidency Towns Insolvency Act (III of 1909), ss. 33 to 37, 43—Examination of persons under s. 36—Application for examination, what should contain—Order, if may be made after insolvent's discharge—Prospect of litigation with Official Assignee, no ground for refusing order. An application for examination of a person under s. 36 of the Presidency Towns Insolvency Act should state shortly the nature of the information likely to be given by the person sought to be examined and the dealings or properties of the insolvent to which such information will relate. The Court can, in a proper case, even after the discharge of the Insolvent, make an order for the examination of a person under s. 36. There is nothing in the Insolvency Act to limit the powers of the Court under that section to the period before the insolvent's discharge, though, having regard to s. 43, it may be that the provisions of s. 36 will not be applicable to the insolvent himself after his discharge. An order for examination under s. 36 should not	

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be refused merely because litigation may ultimately ensue between the Official Assignee and the person sought to be examined. *Re HARI-PADA RAKSHIT. Ex parte BINODINI DASSEE* (1916) I. L. R. 44 Calc. ... 374

———**Provincial Insolvency Act (III of 1907), ss. 5, 6, 1 and 16—Petition by debtor—Debtors right to order of adjudication where all the requirements of the Act have been fulfilled—Dismissal of petition as "an abuse of process of Court" a matter to be dealt with on application for discharge. On an application under the Provincial Insolvency Act (III of 1917) by a debtor to be declared an insolvent where all the conditions specified in the Act have admittedly been satisfied, he is entitled to an order of adjudication. This does not depend on the discretion of the Court, but is a statutory right of which he cannot be deprived by the Court on the ground that his petition is "an abuse of the process of the Court." To this effect there is a current of authority in India that the stage at which to visit with its due consequences any misconduct of a debtor is when his application for discharge comes before the Court, and not on the initial proceeding. *CHHATRAPAT SINGH DUGAR v. KHARAG SINGH LACHMIRAM* (1916) I. L. R. 44 Calc. 535**

———**Debtor and creditor—Adjudication—Debtor presenting his own petition—Application for discharge—Abuse of process of Court—Jurisdiction to annual adjudication—Presidency Towns Insolvency Act (III of 1909), ss. 14, 15, 21, 38—Rules of the Insolvency Act, 1909, rule 142 (a). Where debtors were adjudicated insolvents and an order for annulment of that adjudication was made, and the debtors subsequently presented their petition to be again adjudicated insolvents on the same materials and in respect of the same debt and the same creditors as in their prior**

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application for adjudication: *Held*, that the subsequent application to be adjudged insolvents was an abuse of the process of the Court and that the Court had jurisdiction to annul the latter adjudication in insolvency. *Ex parte Painter*, [1895] 1 Q. B. 85, *In re Betts*, [1901] 2 K. B. 39, *In re Hancock*, [1904] 1 K. B. 585, *In re Archer*, 20 T. L. R. 390, *Samiruddin v. Kadumoyi Dasi*, 12 C. L. J. 445. *Ponnusami Chetti v. Narasimma Chetti*, 25 Mad. L. J. 545, *Triloki Nath v. Badri Das*, I. L. R. 36 All. 250, *Re Aranvayal Sabhapathy Moodliar*, I. L. R. 21 Bom. 297, and *Uday Chand Maity v. Ram Kumar Khara*, 12 C. L. J. 490, referred to. *MALCHAND v. GOPAL CHANDRA GHOSAL* (1916), I. L. R. 44 Cal. ... 899

— *Order of administration—Attachment by creditor prior to order—Sale after order—Rights of attaching creditor—Presidency Towns Insolvency Act (III of 1909), ss. 53 (1), 108, 109.* Section 53 (1) of the Presidency Towns Insolvency Act does not apply to an administration of the insolvent estate of a deceased person under sections 108 and 109 of the Act. But as an attachment in this country only prevents alienation and does not confer any title or create any charge or lien on the attached property such as attaches in England upon seizure under a writ of *fi. fa.*, a creditor who has attached property in execution of a decree has no rights therein prior to sale and, upon the making of an administration order before the property is sold, the property vests in the Official Assignee, and the attaching creditor is relegated to the same position as the other creditors and the sale-proceeds are distributable rateably. *Peacock v. Madan Gopal*, I. L. R. 29 Cal. 428, *Raghunath Das v. Sundar Das Khetri*, I. L. R. 42 Cal. 72; I. L. R. 41 I. A. 251, followed. *Hasluck v. Clark*, [1898]

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2 Q. B. 28; [1899] 1 Q. B. 699, *Johnson v. Pickering*, [1908] I. K. B. 1, *In re Clark*, [1908] 1 Ch. 336, *Ex parte Williams*. *In re Davies*, 7 Ch. 314, *Slater v. Pinder*, 6 Exch. 236; 7 Exch. 95. considered. *Re PREM LAL DHAR* (1917) I. L. R. 44 Cal. ... 1016

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— *Criminal misappropriation or breach of trust—Receipt of money and conversion at head office of a company in Madras Presidency—Loss to complainant in a district in Bengal—Jurisdiction of Court at latter place to try the offences—Criminal Procedure Code (Act V of 1898), ss. 179, 181(2). The jurisdiction of a Court to try*

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the offences of criminal misappropriation or breach of trust is governed by s. 181(2) and not s. 179 of the Criminal Procedure Code. Loss, though a normal result, is not an ingredient of the offences of criminal misappropriation or breach of trust, and not, therefore, a "consequence" within the meaning of s. 179. A complaint of offences under ss. 403 and 406 of the Penal Code against an official of an Insurance Company having its head office at B in the Madras Presidency, where the money was received and the conversion took place, cannot be tried by a Court at K where loss ensured to the complainant. *Ganeshi Lal v. Nand Kishore*, I.L.R. 34 All. 487, and *Rambilas v. Emperor* (1914) Mad. W. N. 894, followed. *Queen-Empress v. O'Brien*, I. L. R. 19 All. 111, and *Langridge v. Atkins*, I. L. R. 35 All. 29, dissented from. *Colville v. Kristo Kis'ore Bose*, I. L. R. 26 Calc. 746, *Emperor v. Mahadeo*, I. L. R. 32 All. 397, distinguished. *SIMHACHALAM v. EMPEROR* (1916) I. L. R. 44 Calc. ... 912

—Leave to withdraw suit by the Appellate Court—Subsequent Suit—*Res-Judicata*—Civil Procedure Codes (Act XIV of 1882), s. 373 (Act V of 1908), O. XXXIII, r. 1. The plaintiff brought a suit for the declaration of his title in respect of certain rights and for other reliefs. This suit was dismissed by the Court of first instance on the merits after the evidence had been gone into. The plaintiff, thereupon, preferred an appeal. At the hearing of the appeal he made an application for leave to withdraw from the suit under section 373 of the Code of Civil Procedure, 1882, on the grounds of a formal defect and of his inability to produce the necessary evidence in time, and obtained an order in the presence

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of the defendants to the effect that the appeal be dismissed with costs and the plaintiff's suit be allowed to be withdrawn with leave for fresh action for the same subject-matter, if not barred. Subsequently, the plaintiff brought a fresh suit against the same parties on the same cause of action as in the previous suit. *Held*, that the ground on which the order was made by the Appellate Court was not a ground which was contemplated by section 373 of the Civil Procedure Code and that, therefore, the order was without jurisdiction. *Khurda Co., Ltd. v. Durga Charan Chandra*, 11 C. L. J. 45, and *Mabulla Sardar v. Hemangini Debi*, 11 C. L. J. 512, referred to. *KALI PRASANNA SIL v. PANCHANAN NANDI* (1916) I. L. R. 44 Calc. ... 367

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—Civil Procedure Code (Act V of 1908), s. 115; O. XXIII, r. 1—*Withdrawal of suit under O. XXIII, r. 1*—Notice to the other side, if necessary—Judicial order—Practice. The High Court has power to set aside orders made under Order XXIII, rule 1, in the exercise of the powers vested in it by section 115 of the Code of Civil Procedure. *Khurda Coal Co. v. Durga Charan*, 11 C. L. J. 45, *Mabulla v. Hemangini*, 11 C. L. J. 512, *Ram Krishna v. Ram Kirpanidh*, 9 All. L. J. 358, *Umesh Chandra Palodhi v. Rakhal Chandra Chatterjee*, 15 C. W. N. 666, *Buratha Gunta v. Thurlapatti*, 9 Mad. L. T. 204, referred to. Though rule 1, of Order XXIII of the Code of Civil Procedure does not specifically require that notice of an application under it must be given to the opposite party, still

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it is an elementary rule of universal application and founded upon the plainest principles of justice that a judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard. *Ajant Singh v. F. T. Christian*, 17 C. W. N. 862, referred to. *Bansi Singh v. Kishun Lall Thakur*, I. L. R. 41 Calc. 632, dissented from. *RAJENDRA LAL SUR v. ATAL BIHARI SUR*, (1916) I. L. R. 44 Calc. ...

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Criminal Procedure Code (Act V of 1898), ss. 185, 527, scope of—"Doubt," meaning of—Transfer—Questions of convenience and expediency—Power of the High Court over Courts outside its territorial limits—Form of order. Held by the majority (WOODROFFE J. dissenting). The High Court has power under section 185 of the Criminal Procedure Code to make an order in respect of an enquiry instituted or trial commenced in a Court situated beyond its territorial limits. Hiran Kumar Chowdhury v. Mangal Sen, 17 C. W. N. 761, *Emperor v. Chaichal Singh*, 9 Cr. L. J. 581, approved. Section 185 is not restricted to proceedings instituted in a Court subordinate to the High Court where the application is made. The section invests that High Court with authority to determine the question within the local limits of whose Appellate Criminal Jurisdiction the offender actually is. Where jurisdiction is given to more Courts than one for the same offence, if a doubt arises as to the Court by which such offence should be tried, it must involve a doubt as to the suitability of one Court as compared with another from the point of view of "convenience" and "expediency." *Rajani Benode Chakravarti v. All-India Banking and Insurance Company*, I. L. R. 41 Calc. 305, dissented

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from. The order should be limited to a declaration that the case should be inquired into or tried by the Court of the Chief Presidency Magistrate in Calcutta. This will leave it open to the prosecution or the applicant to take such steps as they may be advised. *Per WOODROFFE J.* Section 185 does not deal with transfer or decisions on the ground of mere convenience raised by the accused but with doubt as to competency. Section 185 is not designed to cut down admitted jurisdiction but to determine cases where the facts said to constitute jurisdiction are doubtful. These provisions deal with jurisdiction and not with convenience. *Per MOOKERJEE J.* The two sections (185 and 527) have entirely different scopes. In the first place, the order under section 527 is an executive order which may be made without opportunity afforded to the accused to be heard. In the second place, section 527 contemplates an order for transfer, and recourse may possibly be had thereto if an order made by one High Court under section 185 is disregarded by another. *CHARU CHANDRA MAJUMDAR v. EMPEROR* (1916) I. L. R. 44 Calc. ...

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Jury, trial by—Jurymen, communication with by stranger. and by Clerk of the Crown—Police Officer's presence near jury room—Communication of deliberation by jurymen before or after case is over—Habeas Corpus, writ of—Jurisdiction—Criminal Procedure Code (Act V of 1898), s. 491—Letters Patent, 1865, cls. 25 and 26—Trial, violation of—Practice. *Per CURIAM*: It is highly undesirable that a juror should have any communication with any body who is not a jurymen upon the subject matter of the trial. But the mere fact that one of them is addressed by a stranger, to whom apparently the jurymen makes no

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reply or whose remarks the jurymen does not look upon as worthy of consideration, cannot have the effect of invalidating a trial. A mere casual question (which evidently had nothing whatever to do with the case), by a jurymen to a police officer in charge of the jury, it not even being alleged that the Police officer spoke in reply to the jurymen, cannot be any ground for invalidating the trial. Though it is undesirable that a police constable should be stationed in any position in which he can hear the deliberations of the jurymen still if the presence of the constable has not in any way affected the deliberations of the jurors, either by interfering with or inconveniencing them, the accused is not in any way prejudiced. The learned Judge was only doing his duty when he twice sent the Clerk of the Crown to the jury and asked them (in accordance with the practice in the High Court) if he could give them further assistance on any of the many points which were for their consideration, there being no less than 17 charges. The jury are ill-advised to talk with anybody except their fellow jurymen about the case. Whether the case is still going on or after the case is over, the jury would be ill-advised to have any communication with anybody except their fellow-jurymen as to what happened in the jury room. *The Queen v. Murphy*, I. L. R. 2 P. C. Ap. Ca. 535, referred to. *Per CHAUDHURI J.* It is well established that a writ of *habeas corpus* is not granted to persons convicted or in execution under legal process including persons in execution of a legal sentence after conviction on indictment in the usual course. *Ex parte Newton*, 24 L. J. C. P. 148, referred to. When the law does not allow an appeal, the accused cannot have one indirectly

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in this way. When there has been a miscarriage of justice, as alleged in this case, the proper course is to carry the matter to the Crown for remedy. *Queen-Empress v. C. P. Fox*, I. L. R. 10 Bom. 176, referred to. *BONOMALLI GUPTA, In the matter of* (1916) I. L. R. 44 CALC. ... 723

Jute—Fariahs—Trade-usage at Chandpur—Passing of property on sale—Custody with purchaser merely as security for advances—Insurance of that interest, benefit of—Contract Act (IX of 1872), s 81. When nothing remains to be done to the goods by the seller for the purpose of ascertaining the price, then *prima facie* the property in them passes although they have not been weighed by the buyer. *Simmons v. Swift*, 5 B. & C. 857, *Turley v. Bates*, 2 H. & C. 200, *Shoshi Mohun Pal Chowdhry v. Nabo Krishno Poddar*, I. L. R. 4 Calc. 801, *Marineau v. Kitching*, L. R. 7 Q. B. 436, referred to. It would be otherwise in England if the parties intended that property in the goods should not pass until the goods had been weighed. The Indian Law is the same and the provisions of section 81 of the Contract Act do not exclude the question of intention which is laid down in the English cases as the determining factor. Where according to the usage of trade at Chandpur the sale of jute by *fariahs* is not complete until the goods are examined, selected and weighed by the company (purchaser) although stored in the godowns of the company by whom advances have been made to the *fariahs* against these goods:—*Held*, that the contract in the present case being in the first instance a contract for the sale of unascertained goods, what remained to be done by the buyer to the goods appropriated to the contract by the seller was not merely for

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the purpose of ascertaining the price but was also for the purpose of placing the buyers in a position to say whether and to what extent they would for their part accept the goods offered to them. That the position seemed to be that the buyer had a right to the custody of the jute as security for his advances, and that in addition while the seller had no right to sell to others, the buyer was under a corresponding obligation to buy as much of the jute as was of the requisite standard. That (though the company had insured this jute as their own) the insurance appeared to have been intended for the protection of their own interest in the jute, not for the protection of the seller's interest which they were not bound to insure. That the defendants, therefore, were entitled to apply the whole amount which they received under the policies of insurance to indemnify themselves against the loss which they themselves had actually sustained and were not bound to apply any portion of it to the benefit of the plaintiff. That there was no usage that the loss is borne entirely by the company in cases where the jute is not insured to the full extent. *ABDUL AZIZ BEPARI V. JOGENDRA KRISHNA ROY* (1916) I. L. R. 44 Calc ... 98

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Land Acquisition—Recoupment—Compulsory acquisition—Calcutta Improvement Act (Beng. V of 1911), ss. 39, 40, 41(a), 41(b), 42(a), 49(2), 68, 69, 78, 81, 122(c), 122(d)—“Street”—“Affected”—Jurisdiction of the Civil Court Publication of a notification under s. 49(2)—Its effect—Interpretation of Statutes—Legislature, object of, must be determined

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as expressed in the provisions of the Statute. The acquisition of land for the purpose of recoupment is not specified as one of the objects of the Calcutta Improvement Act and by no stretch of language can it be maintained that recoupment is one of the purposes of the Act. The Trustees have not been empowered to acquire land compulsorily for the purpose of recoupment and ss. 41, 42, 78, 81, 122, or 123 of the Act do not confer any such power on them. Sections 41 and 42 deal merely with matters which must be or may be provided for when an improvement scheme is framed; they do not directly or indirectly authorise the compulsory acquisition of any land. Clause (a) of section 41 refers to the acquisition of land required for the execution of the scheme; while section 78 authorises the abandonment of land not required for the execution of the scheme. Sections 78 and 81 have no connection with compulsory acquisition of land. Sections 122 and 123 only regulate the mode in which the accounts are to be kept and do not sanction compulsory acquisition of land. Section 69 is the only section in the whole Act which deals with compulsory acquisition of land and the Board, under that section, is not competent to acquire land compulsorily for recoupment. There is no foundation for the contention that the Legislature has resorted to an indirect method to deprive private owners of their property by provisions in the Act which effectually confer on the Board a disguised authority to acquire land compulsorily to purposes of recoupment. Section 78 was not intended to be used as a cover for the arbitrary acquisition of private property for purposes of recoupment—such recoupment to be made either by way of levy of a lump sum from the owner or a periodical tax

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payable out of the property or by way of acquisition of the land for profitable resale hereafter. Neither section 78 nor section 81 necessarily implies a power of acquisition for recoupment. The intention to impose a charge on the subject must be shown by clear and unambiguous language. By the provisions of the fifth chapter only three taxes are imposed and it would be against well-known rules of construction of statutes to hold that another tax was, by implication, imposed upon the subject. In all instances where unlimited powers of interference are intended to be conferred on the executive authorities, the Statute puts the matter plainly and beyond dispute. *Stockton Railway Co. v. Barrett*, 11 Cl. & Fin. 590; 65 R. 261, *Ezra v. Secretary of State for India*, I. L. R. 32 Calc. 605, referred to. It is plain that "providing building site" under section 39(a) does not mean buying up land already fit for building site or pulling down houses and selling the land for building site; it means, making it possible to use as building site land which cannot for various reasons be now used as building site. Section 2(n) shows that the expression "public street" has the same meaning as in section 3(37) of the Calcutta Municipal Act. According to that definition the term "street" does not include either the abutting lands on both sides or the houses thereon. Section 41(b) only contemplates that the scheme shall provide for the lay out or relay out of such land in the area comprised in the scheme as may be validly acquired by or become otherwise vested in the Board. The section does not imply an obligation on the Board and corresponding authority on their part to acquire compulsorily all the land situated in the area comprised in the scheme. Section

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49(2) does not deprive the Civil Court of jurisdiction to determine whether the action of the Board is or is not *ultra vires*. It merely provides that after the publication of sanction the scheme cannot be impeached on the ground that it has not been framed and sanctioned duly, that is, in conformity with the procedure prescribed by the Act; but there is nothing in the section which takes away the jurisdiction of the Civil Court to investigate whether the action taken by the Trustees has or has not been in excess or in violation of statutory authority. This follows from a plain reading of section 49 and is confirmed by sections 155 and 160 which would be entirely superfluous if section 49(2) completely barred suits of all description in the Civil Court. When local authorities are authorised to take lands from time to time for specific works, such as street widening and the land is not specified in the Act, they cannot in order by resale, to reduce the expense to the rate-payers, take more than is *bona fide* necessary for the purpose. The object of Legislature must be determined as expressed in the provisions of the Statute; it is not permissible to speculate about the expressed intention of the Legislature; nor are we concerned with difficulties, real or imaginary, which may arise from the adoption of the expressed intentions of the Legislature. *Donaldson v. Mayor of South Shields Corporation*, 72 L. T. 685; 63 L. J. Ch. 102, referred to. A section which bars a suit for an act done does not prohibit a suit for an injunction to restrain the commission of an act not done but threatened to be done. *Ganoda Sundary v. Nalini Ranjan Raha*, I. L. R. 36 Calc. 28, referred to. Land may well be said to be "affected" by the execution of a scheme within the meaning of section 42(a)

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when, by the construction of the improvement works, there is a physical interference with any right, public or private, which the owner is entitled to exercise in connection with that property. *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243, *Directors of G. W. Ry. Co. v. May*, L. R. 7 H. L. 283, *King v. Halliday*, [1916], 1 K. B. 738, *Western Counties Ry. Co. v. Windsor and Amnapolis Ry. Co.*, 7 A. C. 178, *Commissioner of Public Works v. Logan*, [1903] A. C. 355, *Ex parte Jones*, L. R. 10 Ch. App. 663, *Randall v. Blair*, 45 Ch. D. 139, *Duke of Devonshire v. O'Connor*, 24 Q. B. D. 468, *Galloway v. Mayor of London*, L. R. 1 H. L. 34, *Hendon Local Board v. Pounce*, 42 Ch. D. 602, *Lynch v. Commissioners of the City of London*, 32 Ch. D. 72, *Rolls v. School Board of London*, 27 Ch. D. 639, *North London Ry. Co. v. Metropolitan Board of Works*, 28 L. J. Ch. 909, *Gard v. Commissioners of Sewers of the City of London*, 28 Ch. D. 486, *Denman & Co. v. Westminster Corporation* [1906], 1 Ch. 464, *Kreglinger v. N. Patagonia Meat Co.*, [1914] A. C. 25, and *Fernley v. Lime House Board of Works*, 68 L. J. Ch. 344, *Wells v. London Tilbury Railway Co.*, 5 Ch. D. 126, referred to. TRUSTEES FOR THE IMPROVEMENT OF CALCUTTA *v* CHANDRA KANTA GHOSH (1916), I. L. R. 44 Calc. ... 219

Landlord and Tenant—Suit for ejectment—Notice to quit—Tenancy reserving an annual rent—What notice a tenant holding an annual tenancy is entitled to—Transfer of Property Act (IV of 1882), ss. 106, 107. The defendant's brother, one Chandu, by a registered *kabuliyat*, took a lease of 2 cottahs of land from the landlord, at an annual rental of Rs. 12 for residential purpose. On the death of Chandu, his heirs, including the defendant, con-

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tinued to live on the land and, subsequently, the defendant's name was substituted in the landlord's *sherista* as tenant in respect of 2½ cottahs of land at an annual rental of Rs. 15. Thereafter, the landlord executed a registered *potta* and let out one bigha of his lands, including the defendant's portion for a period of 39 years, to one Sheikh Fasiulla, who accepted the defendant as tenant of a portion of it. Fasiulla then transferred his interest to one Mamsa, who, subsequently, sold the same to the plaintiff. On the defendant's failure to pay rent for the 2½ cottahs of land, the plaintiff on the 10th Kartik, 1318, corresponding with the 27th October, 1911, served the defendant with a notice to vacate the land within the 30th Kartik, 1318, corresponding with the 16th November, 1911. The defendant failed to comply with this notice. The plaintiff, thereupon, brought a suit for ejectment and khas possession and for arrears of rent. *Held*, that the rent being an annual rent and there being nothing to rebut the presumption in such a case that the tenancy was of a character corresponding thereto, the presumption ought to be drawn that the tenancy was to be an annual tenancy. *Durgi Nikarini v. Gobordhan Bose*, 20 C. L. J. 448, referred to. *Held*, also, that inasmuch as there was a contract of tenancy between the plaintiff and the defendant, but there was no registered instrument as required by section 107 of the Transfer of Property Act, this case came within s. 106 of that Act. *Held*, further, that inasmuch as this was a lease of immovable property and not for agricultural or manufacturing purposes, but for some other purpose, it must be deemed to be a lease from month to month terminable on the part of either lessor or lessee, by 15 days' notice expiring

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with the end of a month of a tenancy. <i>SHEIKH AKLOO v. SHEIKH EMAMAN</i> , (1916) I. L. R. 44 Cal.	403
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— (XVIII of 1879), s. 6: <i>See</i> PLEADER	290
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— <i>See</i> SALE FOR ARREARS OF REVENUE	412
— <i>Limitation Act (XV of 1877), Sch. II, Arts. 110 and 116—Suit for royalties due under a registered lease of land with right to dig coal—Point not allowed to be taken which was not raised in the lower Courts nor in grounds of appeal to High Court or Privy Council—Form of decree where a party has refused to join as a plaintiff and has been made a defendant—Power to alter decree with-</i>	

Limitation—*contd.*

out an appeal. To a suit for royalties due under a registered lease of certain land with the right to dig coal, Art. 116 of Sch. II of the Limitation Act, 1877, "for compensation for breach of a contract in writing registered," and providing a six years period of limitation, and not Art. 110 for "a suit for arrears of rent," and giving only three years, was held to be applicable. There is a long established distinction in the Limitation Acts in favour of registered instruments and a long course of decisions in the Indian Courts in support of this interpretation of the Acts. *Ram Narain v. Kamta Singh*, I. L. R. 26 All. 138, dissented from. A point that as the royalty for one kist was in any case barred the amount of the decree should be reduced was held not to be open to the appellant to take, if not having been raised in either of the lower Courts, nor in the grounds of either the appeal to the High Court, or that to the Privy Council. One of the parties on refusing to join as a plaintiff was made the second defendant and included in his defence a claim for a decree against his co-defendant which the first Court gave him separately from the decree in favour of the plaintiffs. The High Court on appeal altered the form of the decree by giving a decree for the entire amount in favour of the plaintiffs, and declaring that for a named portion it was for their share, and as to the residue it was for the share of the second defendant. The second defendant did not appeal, but the principal defendant by his appeal brought the entire decree before the High Court, disputing it *in toto*. *Held*, that in the absence of any provision in the Civil Procedure Code or in any other enactment which showed clearly that the High Court had no power to make the decree it had

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passed, and the whole decree being before it, the High Court had jurisdiction to make the decree which should have been made by the first Court. *TRICOMDAS COOVERJI BHOJA v. GOPINATH JIU THAKUR* (1916), I. L. R. 44 Calc. ...

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Limitation Act (XV of 1877), Sch. II, Arts. 142, 144—Suit to recover land diluviated and re-formed in situ—Dispossession—Adverse possession—Continuation of possession of land while diluviated—Definition section 3 of Limitation Act—Continuous possession of successive owners when it cannot be combined. The appellants sued to recover khas possession of a 10-anna share with mesne profits in portions of certain mauzas which after being diluviated had reformed in situ. The question was whether the land in suit belonged to the plaintiffs' mahal, or to the principal respondents' (defendants') mahal. The suit was brought on 6th September 1904. The Subordinate Judge found in favour of the plaintiffs' title and that the suit was not barred by limitation. It was common ground that the period of limitation applicable was twelve years, the main contest being as to whether article 142 of Schedule II of the Limitation Act, 1877, was applicable, or article 144. The High Court decided the case on limitation alone holding that the suit was barred by article 142. *Held* by the Judicial Committee (upholding the decision of the first Court both on title and limitation), that there had not been down to September 1892 any dispossession of the plaintiffs within the meaning of article 142. An owner of land does not discontinue his possession of it whilst it is diluviated. Constructively it continues until he is dispossessed, and upon the cessation of the dispossession before the statutory period of limitation has elapsed, constructively it survives.

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Leigh v. Jack, L. R. 5 Exch. D. 264, per COTTON L. J., followed. It seemed to follow that there can be not continuance of adverse possession when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation, *Secretary of State for India v. Krishnamoni Gupta*, I. L. R. 29 Calc. 518; L. R. 29 I. A. 104, approved. In the present case beyond temporary utbandi cultivation there was nothing down to 1892 to show an exclusion of the plaintiffs by the Revenue authorities. Whether the land cultivated was the same each year or not does not appear: at any rate it was annually submerged, and there were no circumstances to link together various portions of ground so as to make the possession of a part, as it emerged, amount constructively to the possession of the whole. *Mohini Mohan Roy v. Promoda Nath Roy*, I. L. R. 24 Calc. 256, referred to. No dispossession having occurred (except possibly within 12 years of the commencement of the suit), article 144 and not article 142 was the article applicable. Whether or not in the circumstances of the case conduct which was insufficient to evidence dispossession can be used to evidence adverse possession available to the defendants, they failed on the ground that the period of time necessary to bring them under the protection of article 144 could not be made out unless to the period during which they were in possession there was added, out of the prior period when it is contended the Revenue authorities had possession, a number of years going back to 1892, and that could not be done in this case for the reason shown in the definition section 3, that the defendants did not derive their liability to be sued "from or through" the Revenue authorities

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in any sense of the words. They had in the fact advance a claim adverse to those authorities and had succeeded in it. <i>BASANTA KUMAR ROY v. SECRETARY OF STATE FOR INDIA</i> (1917) I. L. R. 44 Calc. ...	858	mind to be affected by outside matters. The proper thing for him to do is to be attended by a representative of either side for the purpose of identifying the points which are material in the case on the one side or the other; and he ought not to allow himself to enter into general conversation with the people of the neighbourhood about the case. <i>CHANDRA KUMAR GHOSE v. MAHENDRA KUMAR GHOSE</i> , (1916) I. L. R. 44 Calc. ...	711
— <i>Payments towards debt—Court, if it can find out whether it is for principal or interest—Limitation Act (IX of 1908), s. 20.</i> Where payments are made towards a debt, but there is nothing to show whether they had been made in respect of principal or interest, the Court is entitled to find out on the evidence for what purpose the payments were made. <i>HEM CHANDRA BISWAS v. PURNA CHANDRA MUKHERJI</i> (1916), I. L. R. 44 Calc. ...	567	Loss of Goods—Notice—“Railway administration”—Railways Act (IX of 1890), ss. 3 (6), 77, 140—Scope of section 140—Notice to Government through Collector—Limitation Act (IX of 1908), Sch. I, Arts. 30, 31, 115—Contract—Breach of contract, for non-delivery. Section 140 of the Railways Act has not the effect of cutting down the connotation of the words “railway administration” as contained in section 3 (6). It only provides for the convenience of the party aggrieved that if he wants to serve the notice on the Manager of the State Railway or the Agent of the Railway Company he must do so in one of the ways mentioned there. If the party chooses to give notice to the Government or the Native States or the Railway Company there is nothing in the Act to prevent his doing so; the latter alternative may enhance his trouble but it cannot take away his rights. <i>Secretary of State for India v. Dip Chand Poddar</i> , I. L. R. 24 Calc. 306, <i>Great Indian Peninsula Railway Co. v. Chandra Bai</i> , I. L. R. 28 All. 552, <i>Janaki Das v. Bengal Nagpur Railway Co.</i> , 16 C. W. N. 356, <i>Periannan Chetti v. South Indian Railway</i> , I. L. R. 22 Mad. 137, <i>Nadiar Chand Shaha v. Wood</i> , I. L. R. 35 Calc. 194, referred to. <i>Per Chatterjee J.</i> Notice served upon the Government through the Collector within six months is sufficient to satisfy	
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Local Investigation—Proper mode of conducting local investigations—Practice. Great care ought to be taken by a Magistrate who holds a local investigation to see that he is not approached by an outsider and that he does not allow his			

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the requirements of section 77 of the Act. Article 30 of the 1st Schedule to the Limitation Act does not apply where the plaintiff's case is not for the loss of the goods, and where the defendant does not plead or prove any loss. *Per* Chatterjee J. Article 31 applies to suits against a carrier for compensation for non-delivery of or delay in delivering goods, and the time for suit is one year from the time when the goods ought to be delivered. This article contemplates a suit by the consignee and further it casts upon the carrier the onus of proving when the goods should have been delivered. When there is breach of a written contract Art. 115 of the Schedule governs the case. *Mohan Sing Chawan v. Henry Conder*, I. L. R. 7 Bom. 478, *Danmull v. British India Steam Navigation Co.*, I. L. R. 12 Calc. 477, referred to. *RADHA SHYAM BASAK v. SECRETARY OF STATE FOR INDIA* (1916) I. L. R. 44 Calc.

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Lurking House-trespass—Theft—Penal Code (Act XLV of 1860), ss. 456, 457, 380—**Trial for house-trespass and theft under ss. 457, 380, Penal Code—Disbelief of story of theft—Finding of intention to make immoral proposals—Conviction under s. 456, legality of—Prejudice—Criminal Procedure Code** (Act V of 1898), s. 238—**Necessity of charging intention in cases under s. 456—Intention how determined—Rule of construction of decided cases.** On a trial for offences under ss. 457 and 380 of the Penal Code, although the alleged intention, viz., to commit theft has failed, the Court can, under s. 238 of the Criminal Procedure Code, convict the accused of a minor offence, under s. 456 of the Penal Code, if he has not been prejudiced thereby. Where

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on an allegation that the accused entered the room of a widow at night and committed theft, he was tried summarily for offences under ss. 457 and 380, and set up the defence of previous intrigue and entry with such intent at her invitation, but the Court disbelieved the stories of theft and intrigue and found the entry to have been without her consent and in order to make immoral proposals to her to her annoyance: *Held*, that that the conviction under s. 456 of the Penal Code was legal, and that the accused had not been prejudiced in the circumstances. *Jharu Sheikh v. King-Emperor*, 16 C. W. N. 696, distinguished. *Koilash Chandra Chakrabarty v. Queen-Empress*, I. L. R. 16 Calc. 657, *Balmakund Ram v. Ghansamram*, I. L. R. 22 Calc. 391, *Premnundo Shaha v. Brindabun Chung*, I. L. R. 22 Calc. 994, *Emperor v. Ishri*, I. L. R. 29 All. 46, *Sher Singh v. Empress*, (1833) Punj. Rec. 14, *Lalji Ram v. Queen-Empress*, (1898) Punj. Rec. 12, *Ramrang v. King-Emperor*, (1902) Punj. Rec. 18, *Queen-Empress v. Balu*, (1886) Ratan Unrep. Cr. C. 293, approved. In determining the question of prejudice, the nature of the case made at the trial, the evidence given and the line of defence of the accused are matters to be taken into consideration. *Reg. v. Govindas Haridas*, 6 Bom. H. C. 96, referred to. To sustain a conviction under s. 456 of the Penal Code, it is not necessary to specify the criminal intention in the charge. It is sufficient if a guilty intention contemplated by a s. 441 is proved. The intention may be determined from direct evidence or from the conduct of the accused and the attendant circumstances of the case. *Balmakund Ram v. Ghansamram*, I. L. R. 22 Calc. 391; *Reg. v. Dixon*, 3 M. & S. 11, referred to. Every

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judgment must be read as applicable to the particular facts proved or assumed to be proved. <i>Quinn v. Leatham</i> , [1901] A. C. 495, followed. <i>KARALI PRASAD GUPTA v. EMPEROR</i> (1916) I. L. R. 44 Calc. ...	358
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Pre-emption—Exercise of right, when enforceable—Question of law, at what stage of case can be raised—Decree, nature of—When Court should take notice of events happening after institution of suit. A person who seeks the assistance of a Court with a view to enforce a right of pre-emption is bound to establish that the right existed at the date of the sale, at the date of the institution of the suit, and also at the date of the decree of the primary Court.— <i>Ram Gopal v. Piari Lal</i> , I. L. R. 21 All. 441, and <i>Tafazzul Husain v. Than Singh</i> , I. L. R. 32 All. 567, followed. When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy it is not only competent but expedient in the interests of justice to entertain the plea. <i>Connecticut Fire Insurance Co. v. Kavanagh</i> , [1892] A. C. 473, followed. Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to have the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, it is incumbent upon a Court of justice to take notice of events which have happened since the	

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institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. <i>Rai Charan Mandal v. Biswa Nath Mandal</i> , 20 C. L. J. 107, referred to. <i>NUBI MIAN v. AMBICA SINGH</i> , (1916) I. L. R. 44 Calc. ...	47
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Misdirection : See COUNTERFEIT COIN ...	477
Mortgage : See EVIDENCE ...	345
— <i>See PENALTY</i> ...	162
— <i>Agreement postponing payment of interest and selling property to mortgagee if not then paid—Construction of contract—Mode of calculating the manner of payment of purchase money under the contract on execution of decree or specific performance—Delay in transfer of property to mortgagee—Rules of English Courts as to rights of Vendor and Purchaser—Transfer of Property Act (IV of 1882), s. 54.</i> A mortgage deed of certain land was executed in favour of the appellant to secure re-payment of Rs. 50,000 with interest, which the mortgagor expressly covenanted to pay, on 30th December 1905, which we afterwards extended for three months from 3rd January 1906. On 4th April 1906, the mortgagor, being unable to pay the interest, wrote as follows to the mortgagee: "I write this to inform you that as I have not got the interest due on Rs. 50,000 ready now, I request you to give me three months more for payment to you of all interest due thereon. Should I fail to do so on or before 6th July 1906, I agree to the whole land being sold to you for Rupees one lakh (Rs. 1,00,000). After deducting	

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out of this amount Rs. 50,000 already received by me and all interest due thereon, the balance should be paid to me when the land shall become yours unconditionally." The mortgagee agreed to these terms, and the loan was renewed on 6th April 1906, the interest was not paid on 6th July, and mortgagor refused to execute a conveyance of the property. In a suit for specific performance of the contract of 4th April 1906, the mortgagee obtained a decree in May 1909, but he only entered into possession of the property on 24th March 1911. On an application for execution of the decree, a question arose as to the manner in which the purchase-money payable under the contract ought, to be calculated, and an Appellate Bench of the Chief Court decided that the mortgagee was only entitled to bring into account the amount due for principal and interest up to 6th July 1906. *Held* by the Judicial Committee (reversing that decision), that on the true construction of the contract, the appellant was entitled to deduct interest up to the date of his getting possession. The general rules by which the rights of vendors and purchasers are regulated were not applicable here, because the rights as to the payment of interest were governed by the express provisions of the contract. *Semle*: The rules of English Courts of Equity had no application to the sale of real estate in Lower Burma, section 54 of the Transfer of Property Act expressly providing that (apart from a registered instrument) such a contract created no interest in, or charge upon, the land. **MAUNG SHWE GOH v. MAUNG INN**, (1916) I. L. R. 44 Calc. ...

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—*Leasehold property—Mortgagee, if entitled to pay rent to preserve property from being lost.*

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The mortgagee is entitled to preserve mortgaged property from being lost for non-payment of rent. Where rent is thus paid after the preliminary decree and before the final decree, the money paid for rent should in the final decree be added to the mortgage money found due in the preliminary decree. **ALLAHABAD BANK, LD. v. MATI LAL BARMAN**, (1916) I. L. R. 44 Calc. ...

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—*Usufructuary mortgage, construction of—Balance remaining due to mortgagee at end of term of mortgage—Allegation in plaint of wrongful acts by mortgagor by which mortgagee was deprived of part of his security—Transfer of Property Act (IV of 1882), ss. 58, 59 and 68—Mortgage deed unattested and not enforceable as a mortgage—Privy Council, practice of—Reinstatement and rehearing after decision of case ex parte.* The question for determination on this appeal was whether the respondents (mortgagees) were entitled to recover from the appellant (mortgagor) the balance due on a usufructuary mortgage dated 14th April 1896, where it was alleged that they had been deprived of part of their security by the wrongful acts of the mortgagor. It had been calculated that the amount borrowed, with interest, would be paid off by the rents of the properties mortgaged, on 14th January 1903 when they were to be returned to the mortgagor. Both parties acted on the deed, but on the date mentioned it was found that the mortgagee in possession had not by the collection of the rents received sufficient to discharge the principal of the loan with interest as mentioned in the deed. In a suit brought by the mortgagee on 13th January 1909, the deficiency was attributed in paragraphs 6 and 7 of the plaint to the facts that the defendant

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(mortgagor) had taken rents which should have gone to the mortgagee, but which had not been paid over to him by the mortgagor, and that the rents in some cases were less than those mentioned in the deed, and those were wrongful acts complained of. The claim was for a mortgage decree under Order XXXIV, rule 4 of the Civil Procedure Code, 1908, or in the alternative for a decree for the amount due on the footing of the personal liability of the mortgagor. In the course of the suit it appeared that the mortgage deed had not been attested and the Subordinate Judge held that it could not, having regard to section 59 of the Transfer of Property Act (IV of 1882) be enforced as a mortgage, which decision as it was not appealed from, became final. The sole question therefore was whether the mortgagor was personally liable. The facts on which the allegations of wrongful acts by the mortgagor were based were not investigated, but both Courts in India held that on the construction of the deed it imposed a personal liability on the mortgagor and they made decrees in his favour. *Held* (reversing those decisions), that the nature and terms of the deed were such as to show that it was not originally intended that the mortgagor should be personally liable. The respondent ought to be given an opportunity of proving the allegations in paragraphs 6 and 7 of the plaint and of establishing that those facts were sufficient to bring section 68 of the Transfer of Property Act into operation. The position of the mortgagor under that section could not, however, by reason of the deed, be better than it would have been if the mortgage had been duly attested. The case was for that purpose remitted to India for further trial. After the appeal

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had been heard *ex parte* and judgment had been given in favour of the appellant, the respondents were allowed to have it reinstated and reheard on the ground that the person with whom they came to an agreement to defend the appeal on their behalf, and to whom they advanced funds to pay the expenses of entering appearance, and taking other necessary steps in the conduct of the appeal, defrauded them, misappropriated the money without doing anything in the matter of the appeal, and left them in complete ignorance of its progress, until they discovered that there was not a word of truth in his misrepresentations and that the appeal had been decided *ex parte* against them. They had to pay the costs of the first hearing as the appellant was in no way to blame. *RAM NARAIN SINGH v. ADHINDRA NATH MUKERJI* (1916), I. L. R. 44 Cal. ... 388

— — — — — *decree: See SALE IN EXECUTION OF DECREE* ... 524

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Mosque Property, suit for—Leave of Court—Civil Procedure Code (Act V of 1908) O. I., r. 3—Failure to obtain permission before institution of the suit—Its effect—Objection for want of such permission, if fatal to the suit. There is no doubt that the proper course is to obtain permission under Order I, rule 8, before the suit is instituted, but there is nothing in the rule to show that if it is not so done, it cannot be granted afterwards. The mere fact that the leave of the Court was not obtained before the institution of the suit should not result in the dismissal of the

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<p>suit. Permission under Order I, rule 8, can be granted subsequent to the filing of the suit. The objection under s. 30 of the old Civil Procedure Code which corresponds with Order I, rule 8, of the present Code, is not one affecting the jurisdiction of the Court. <i>Fernandez v. Rodrigues</i>, I. L. R. 21 Bom. 784, <i>Chennu Menon v. Krishnan</i>, I. L. R. 25 Mad. 399, <i>Srinvasi Chariar v. Raghava Chariar</i>, I. L. R. 23 Mad. 28, <i>Baldeo Bharthi v. Bir Gir</i>, I. L. R. 22 All. 269, followed. <i>Jan Ali v. Ram Nath Mundul</i>, I. L. R. 8 Calc. 32, <i>Lutifunissa Bibi v. Nazirun Bibi</i>, I. L. R. 11 Calc. 33, referred to. <i>Oriental Bank Corporation v. Gobind Lall</i>, I. L. R. 9 Calc. 604, dissented from. <i>Dhunput Singh v. Paresh Nath Singh</i>, I. L. R. 21 Calc. 180, distinguished. <i>AHMED ALI v. ABDUL MAJID</i>, (1916) I. L. R. 44 Calc. ... 258</p>	
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<p>Non-occupancy Raiyat—Khamar land—Statute—Headings of Chapters—Bengal Tenancy Act (VIII of 1885), Ch. XI, s. 45 and Sch. III, Cl. 1 (a). A tenant of a <i>khamar</i> land is not a non-occupancy raiyat. The heading of a chapter in a statute may be looked at for the purpose of interpreting a section in the statute. <i>DWARKANATH CHAUDHURI v. TAFAZAR RAHMAN SARKAR</i> (1916) I. L. R. 44 Calc. ... 267</p>	
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<p>Occupancy Holding—Non-transferable occupancy Holding—Under-raiyat—Whether fresh settlement holder required to serve notice on under-raiyat after ejectment of transferee by landlord—Notice—Bengal Tenancy Act (VIII of 1885), s. 49, cl. (b). Where a person has obtained settlement of a holding from the superior landlord after the latter had ejected the transferee of the occupancy raiyat from the said holding as it was not transferable, he is not required to serve a notice to quit on the under-raiyat under s. 49 of the Bengal Tenancy Act in his suit for ejectment. <i>Nilkanta Chaki v. Ghatoo Sheikh</i>, 4 C. W. N. 667, and <i>Badan v. Rajeswari</i>, 2 C. L. J. 570, followed, <i>Lal Mahomed Sarkar v. Jagir Sheikh</i>, 13 C. W. N. 913, <i>Amirullah Mahomed v. Nazir Mahomed</i>, I. L. R. 31 Calc. 932, <i>Amirullah Mahomed v. Nazir Mahomed</i> I. L. R. 34 Calc. 104, and <i>Raghuwath Singh v. William Cor.</i>, 19 C. W. N. 268, distinguished. <i>JADAB SARDAR v. GOBINDA CHANDRA MANDAL</i>, (1916) I. L. R. 44 Calc. ... 272</p>	
<p>—————Transferability—Attachment—Objection of raiyats—Consent of landlords. A non-transferable occupancy holding or a part of it cannot be sold in execution of a decree for money obtained against the raiyat when the raiyat objects to the sale on the ground of non-transferability even, if the landlords give their consent to the sale. The above rule does not, as expressly laid down by the Full Bench in <i>Dayamayi v. Ananda Mohan Roy Chaudhuri</i>, I. L. R. 42 Calc. 172; 18 C. W. N. 971, apply to a sale held in execution of a decree founded on a mortgage or charge voluntarily made by the raiyat. <i>Dayamayi v. Ananda Mohan Roy Chaudhuri</i>, followed. <i>Badrannessa Choudhrani</i></p>	

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v. <i>Alam Gazi</i> , 19 C. W. N. 814, referred to. <i>Ananda Das v. Rutnakar Pania</i> , 7 C. W. N. 572, <i>Shakaruddin Choudhry v. Rani Hemangini Dasi</i> , 16 C. W. N. 420 commented on. <i>NARAYANI v. NABIN CHANDRA CHAUDHURI</i> , (1916) I. L. R. 44 Calc. ...	720
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— <i>Interest, exorbitant rate of—Inference by Court—Court's power to reduce rate of interest—Mortgage—Release of one joint mortgagor, effect of—Contract Act (IX of 1872), ss. 44, 74. It is competent to a Court to grant relief whenever the stipulation for payment of interest at a specified rate appears to the Court to be a stipulation by way of penalty. What constitutes a stipulation by way of penalty must be determined in each individual case upon its own special circumstance. Webster v. Bosanquet, [1912] A. C. 394, Khagaram Das v. Ram-sankar Das Pramanik, I. L. R. 42 Calc. 652, Bowang Raja Chellaphroo Chowdhuri v. Banga Behari Sen, 20 C. W. N. 408, Abdul Majeed v. Khirode Chandra Pal, I. L. R.</i>	

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42 Calc. 690, and <i>Gopeshwar Saha v. Jadav Chandra Chanda</i> , I. L. R. 43 Calc. 632, referred to. <i>Per SANDERSON C. J.</i> The release of one of several joint mortgagors with no express reservation of the mortgagee's remedy against the other mortgagors, does not <i>ipso facto</i> release the other mortgagors. <i>KRISHNA CHARAN BARMAN v. SANAT KUMAR DAS</i> (1916) I. L. R. 44 Calc. ...	162
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Pleader—Admission of women as pleaders—Disqualification—Constant Tradition—Regulation of 1781 for the Administration of Justice—Regulation VII of 1793 (Vakils), Preamble—Regulation XXVII of 1814 (Vakils), Preamble, ss. 4, 5, 10 to 14, 18, 20 to 22, 30, 35, 37—Legal Practitioners Act (I of 1846), ss. 4, 12—Pleaders of Lower Provinces Act (XVIII of 1852)—Legal Practitioners Act (XX of 1853)—Calcutta University Act (II of 1857)—Penal Code (XLV of 1860), s. 8—Succession Act (X of 1865), s. 3—Mofussil Small Cause Courts Act (XI of 1865), s. 1—Pleaders, Mukhtears and Revenue Agents Act (XX of 1865), ss. 2, 5, Sch II—The Punjab Chief Court's Act (XXIII of 1865), s. 1—Pleaders Amending Act (XXIX of 1865)—General Clauses Act (I of 1868), s. 2 (1)—Legal Practitioners Act (XVIII of 1879) s. 6, High Court Rules thereunder—General Clauses Act (X of 1897) s. 13. As the law now stands, women are not entitled to be enrolled as pleaders of Courts subordinate to the High Court. The Rules of the High Court were made in accordance with and for the purpose of carry-	

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ing out the intention of the Legal Practitioners Act, 1879, and are not <i>ultra vires</i> . <i>Per MOOKERJEE J.</i> It is improper to give an extended construction of a statute, in the absence of an intention on the part of the Legislature, to reverse the established policy or to introduce a fundamental change in long established principles of law. Where it appears that a change of such a policy is desirable, the proper remedy is legislation and not an alteration of the law in the disguise of judicial exposition of the existing law. Case law on the subject referred to. <i>Per CHITTY J.</i> In framing rules under an Act of the Legislature, the Court should not use any particular expression or word in a different sense to that applied to the particular expression or word by the Act itself. But it is doubtful whether the General Clauses Act applies to rules framed by the High Court under the Legal Practitioners Act, 1879. <i>REGINA GUHA, In re, (1916) I. L. R. 44 CALC.</i> ...	290
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— Partition suit—Parties—	
Review— <i>Civil Procedure Code (Act V of 1908) s. 152, O. XLVII, r. 1.</i>	
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Fraudulent representation. Where the mortgagees of the plaintiff's share in a partition suit applied (i) to be added as parties to the suit, and (ii) for revocation of an order made by another Judge directing a sale of the one-fourth share of certain premises which is one of the properties to be partitioned in the suit on the ground that the conduct of the mortgagors and their attorneys was fraudulent and that the said order was made without jurisdiction:— <i>Held</i> , that one Judge cannot set aside an order made by another Judge, even though the order be wrong. The remedy lies in review on the ground set out in Order XLVII. r. 1. <i>Sharup Chand Mala v. Pat Dasse, I. L. R. 14 Calc. 627, Jatra Mohun Sen v. Aukhil Chandra Chowdhury, I. L. R. 24 Calc. 334, referred to. BASANTA KUMAR DAS v. KUSUM KUMARI DAS, (1916) I. L. R. 44 Calc. ...</i> ...	28
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<i>Puchaser's possession and right to rents and profits continues until full pre-emption price is paid—Civil Procedure Code, 1882, s. 214—Mahomedan law of pre-emption—Change of possession under decree.</i> If a claim to pre-emption be disputed, and a suit must be brought, the rights of the parties are regulated by s. 214 of the Code of Civil Procedure, which in this respect embodies the principle of the Mahomedan Law. That section enacts that "When the suit is to enforce a right of pre-emption in	

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respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid the suit shall stand dismissed with costs." It is therefore only on payment of the purchase-money on the specified date that the plaintiff obtains possession of the property, and until that time the original vendee retains possession, and is entitled to the rents and profits. *Deokinandan v. Sri Ram*, I. L. R. 12 All. 234, approved. In the present case the decree under which possession was given to the pre-emptor (appellant) was made on 31st March 1900 by the Subordinate Judge who found that the pre-emptive price was Rs. 37,000, and on payment of that sum the pre-emptor was put into possession. The High Court reversed that decree and dismissed the suit, but found that the price was Rs. 44,850 as stated in the deed of sale. On 2nd July 1904, the original purchaser was put into possession. On 25th January 1908, the Privy Council set aside the decree of the High Court and restored that of the Subordinate Judge except as to the pre-emptive price which was fixed as being Rs. 44,850, and the additional sum making up that amount having been deposited, possession was again given to the pre-emptor on 19th January 1909. In proceedings in which each party claimed mesne profits from the other, the original vendee from the pre-emptor from 1900 to 1904, and the pre-emptor from the vendee from 1904 to 1909. *Held*, that the possession of the vendee continued

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until 19th January 1909; and the pre-emptor only obtained possession within the meaning of section 214 of the Civil Procedure Code, 1882, on that date. No mesne profits therefore were due to him, but he was liable to the vendee for mesne profits from 1900 to 1904 for which period he was in possession without title. *DEONANDAN PRASHAD SINGH v. RAMDHARI CHOWDHRI*, (1916) I. L. R. 44 CALO. ... 675

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Principal and Agent: See ACCOUNTS, SUIT FOR ... 1

Principal and Surety—Promissory note, payable on demand—Limitation—Payment of interest by principal—Acknowledgment of debt—Liability of surety—Contract of guarantee—Limitation Act (IX of 1908), ss. 18, 20, 21; Sch. 1, Arts. 65, 73, 115—Contract Act (IX of 1872), ss. 126, 128. Where an *on demand* Promissory note was executed by the debtor and bore an endorsement on it "repayment guaranteed by me," signed by the person purporting to make the guarantee and where the said promissory note was unaccompanied by any writing, restraining or postponing the right to sue:

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Held, that the endorsement must be treated as a contract of guarantee by the person purporting to make the guarantee. *Held*, also, that the promissory note was a present debt payable without demand, that the liability of the surety on the guarantee accrued from the date of the promissory note, that the Statute of Limitation began to run in favour of the surety from the date of the note, and that for the purposes of this case it mattered not whether Art. 65 or Art. 115 of the Limitation Act applied. *Norton v. Ellam*, 2 M. & W. 461, *Roue v. Young*, 2 Brod. & Bing. 165, *Maltby v. Murrells*, 5 H. & N. 812, *In re George*, 44 Ch. D. 627, *Perumal Ayyan v. Alagirisami Bhagavathar*, I. L. R. 20 Mad. 245, *Hell v. Hadley*, 2 Ad. & El. 758, *Colvin v. Buckle*, 8 M. & W. 680, *Srinath Roy v. Peary Mohan Mookerjee*, 25 C. L. J. 91, and *Dwarka Doss Govardhana Doss v. Chirakala Krishnaiya*, 21 Mad. L. J. 457, referred to. Where payment of interest on an *on demand* promissory note was made by the principal debtor with the knowledge and consent of the surety and even at his request, but where there was no evidence that it was made on behalf of such surety: *Held*, that the fresh period of limitation created under s. 20 of the Limitation Act by the payment of interest by the principal debtor could be only in respect of the debt upon which the interest was paid, *viz.*, the debt of the principal debtor. The fact that the interest was paid with the knowledge and consent of the surety and even at his request made no difference, unless the circumstances could be said to render the payment one on behalf of the surety. *Domi Lal Sahu v. Roshan Dobay*, I. L. R. 33 Calc. 1278, *In re Powers*, *Lindsell v. Phillips*, 30 Ch. D. 291, *In re Frisby*, 43 Ch. D. 106, *Levin v. Wilson*, 11 App. Cas. 639,

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distinguished. *Krishto Kishori Choudhrani v. Radha Romun Munshi*, I. L. R. 12 Calc. 330, *Hajarimal v. Krishnarav*, I. L. R. 5 Bom. 647, *Coope v. Creswell*, L. R. 2 Eq. 106, *Morgan v. Rowlands*, L. R. 7 Q. B. 493, *Green v. Humphreys*, 26 Ch. D. 474, *In re Boswell*, [1906] 2 Ch. 359, *Astbury v. Astbury*, [1898] 2 Ch. 111, *In re The Estate of William Seager*, 3 Jur. N. S. 481; 26 L. J. Ch. 809, and *Gardner v. Brooke*, 2 I. R. 6, referred to. *Per MOOKERJEE J.* Though the liabilities of the debtor and the surety arise out of the same transaction, the liabilities of the two persons are distinct for the purposes of the application of s. 20 of the Limitation Act. *Gopal Daji Sathe v. Gopl bin Sonu Bait*, I. L. R. 28 Bom. 248, and *Srinivasa Varadachariar v. Echammal*, 21 Mad. L. J. 455, followed. The surety, under the terms of the contract, is either jointly or separately liable, along with the principal debtor; if the debts are deemed joint, s. 21 (2) of the Limitation Act shows that the payment by one of them (the debtor) does not extend the time; on the other hand, if the debts are deemed distinct, the same result follows upon a true construction of s. 20 itself. S. 128 of the Contract Act, which makes the liability of the surety co-extensive with that of the principal debtor, is of no assistance to the plaintiff, as it must be read along with the provisions of the Limitation Act; it defines the measure of the liability and has no reference to the extinction of liability by operation of the Statute of Limitation. A payment by one person cannot keep alive the remedy against another, unless the circumstances are such that payment by the one may be regarded as a payment for the others. There is nothing in the relation of principal and surety itself which makes payment by the

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principal binding as a payment by the surety. *Cockrill v. Sparks*, 1 H. & C. 699; 130 R. R. 739, *Re Wolmerhausen*, 62 L. T. 541, and *Henton v. Paddison*, 62 L. T. 405, referred to. BRAJENDRA KISHORE ROY CHOWDHURY *v* HINDUSTAN CO-OPERATIVE INSURANCE SOCIETY, LD., (1917) I. L. R. 44 Calc. ... 978

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Privy Council, Practice of: See MORTGAGE ... 388

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Appeal in criminal case—Conviction on charge of murder—Sentence of death, confirmation of, by Court of Appeal—Improper admission of evidence by Court of Appeal in treating entries in police diary as being evidence—Criminal Procedure Code (Act V of 1898) ss. 172, 314—Error said to vitiate confirmation of sentence. According to the practice of the Judicial Committee in dealing with an appeal in a criminal case, the general principle is established that the Sovereign in Council does not act in the exercise of the prerogative right to review the course of justice in criminal cases in the free fashion of a fully constituted Court of Criminal Appeal. The exercise of the prerogative takes place only where it is shown that injustice of a serious and substantial character has occurred. A mere mistake on the part of the Court below, as for example, in the admission of improper evidence, will not suffice if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts below. Under section 172 of the Criminal Procedure Code (Act V of

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1898), every police officer making an investigation is to enter his proceedings in a diary which may be used at the trial or inquiry, not as evidence in the case but to aid the Court in such inquiry or trial. And by section 374 when the Court of Session passes sentence of death the proceedings are to be submitted to the High Court for confirmation, and the sentence is not to be executed unless it is confirmed by that Court. In this case which was one of murder the accused was convicted by the Sessions Judge and sentenced to death and that sentence was substantially in every material particular confirmed by the Court of the Judicial Commissioner (as the High Court) on appeal. After confirming the sentence, the Court of Appeal took into consideration the police diary, made during the preparation of the case, for the purpose of testing the credibility of some of the witnesses for the defence, and treated the entries therein as being evidence in the case discrediting them. *Held* by the Judicial Committee, that the Court was clearly wrong in so treating the entries in the police diary in a manner which was inconsistent with the provisions of section 172 of the Criminal Procedure Code. *Queen-Empress v. Mannu*, I. L. R. 19 All. 390, approved. But such improper admission of evidence was not a sufficient reason why their Lordships should recommend interference with the judgment and sentence. The conditions of the Code as to jurisdiction had been complied with; the Court of Appeal had before it evidence on which it placed reliance and on which it could properly have based its affirmation and confirmation of the conviction. An error in procedure may be of so grave a character as to warrant the interference of the Sovereign, as for instance, if it

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deprived an accused of a constitutional or statutory right to be tried by a jury or by some particular tribunal; or it may have been carried to such an extent as to cause the outcome of the proceedings to be contrary to fundamental principles which justice requires to be observed. Even if their Lordships thought the accused guilty they would not hesitate to recommend the exercise of the prerogative, were such the case. But here the error consisted only in the fact that evidence had been improperly admitted which was not essential to a result which might have been come to wholly independently of it. Substantial justice had been done, and that being so, it would be contrary to the general practice to advise the Sovereign to interfere with the result. <i>DAL SINGH v. KING EMPEROR</i> (1917), I. L. R. 44 Calc. ... 876	
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Professional Misconduct—Legal practitioners Act (XVIII of 1879 as amended by Act XI of 1893), ss.13, 14.—Scope of s. 14—Contempt of Court—"Court," meaning of. Section 14 of the Legal Practitioners Act is not limited in its application to cases covered by clauses (a) and (b) only, but covers cases of misconduct under all the clauses of section 13. Misconduct in the presence of the Court which shows disrespect of its authority and which obstructs and has a	

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tendency to interfere with the due administration of justice is contempt. The principle is not limited to misconduct in the actual presence of the Judge; the Court is deemed to be present in every part of the place set apart for its use and for the use of its officers, jurors, and witnesses and therefore misbehaviour in such places is misconduct in the presence of the Court. <i>In the matter of Purna Chunder Pal</i> , I. L. R. 27 Calc. 1023. <i>In the matter of Southekal Krishna Rao</i> , I. L. R. 15 Calc. 152. <i>Le Mesurier v. Wajid Hossain</i> , I. L. R. 29 Calc. 890. <i>In the matter of Muhammad Abdul Hai</i> , I. L. R. 29 All. 61, <i>In the matter of the Second-grade Pleaders</i> , I. L. R. 34 Mad. 29, <i>In the matter of Golab Khan</i> , 7 B. L. R. 179. <i>In the matter of Bajrang Sahai</i> , 15 C. W. N. 269, <i>In the matter of Kali Prasanna Choudhury</i> , 11 C. L. J. 164, <i>In the matter of Radha Charan Chakravarti</i> , 4 C. I. J. 229, <i>In the matter of an Advocate, a Vakil, a Pleader, and a Mukhtear</i> , 4 C. L. J. 262. <i>The District Judge of Krishna v. Hanumanulu</i> , (1915) Mad. W. R. 1050. <i>In the matter of Gunapathi Sastri</i> , 19 Mad. L. J. 504, <i>French v. French</i> , 1 Hogan 138, <i>Rex Carrol</i> , 1 Wilson 75, <i>Roach v. Hall</i> 2 Atk. 469, <i>Ex parte Burrows</i> , 8 Ves. 535, <i>Ex parte Jones</i> , 13 Ves. 237, <i>In re Johnson</i> , 20 Q. B. D. 68, <i>Ex parte Wilton</i> , 1 Dowling N. S. 805, <i>Kirby v. Webb</i> , 3 T. L. R. 763, <i>Charlton's Case</i> , 3 My. & Cr. 16, <i>Helmore v. Smith</i> , 35 Ch. 449, referred to. <i>RASIK LAL NAG, In the matter of</i> (1916) I. L. R. 44 Calc. ... 639	
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Public Drain—House drain—Title—
Calcutta Municipal Act (Beng. 111 of 1899), ss. 3, cl. (16), 286, 337—Vesting of a street in a municipality—Its effect—Rights of the owner.
 The legal effect of the statutory vesting of a street in a municipality is not to transfer to the municipality the ownership in the site or soil over which the street exists. The effect of the statutory provision is merely to vest in them the property in the surface of the street, road or drain and in so much of the actual soil below and air above as may reasonably be required for its control, protection and maintenance as a highway or drain for the use of the public. The Court will not presume that the intention of the Legislature was to confiscate private property and vest it in a public corporation without compensation granted to the proprietor. The right of the owner was intended to be abridged only to the extent necessary for the discharge of the statutory duties imposed on the Corporation for the benefit of the public. The property of the local authority concerned does not extend further than is necessary for the maintenance and use of the highway as a highway; that subject to this qualification, the original owner's rights and property remain, and that if the highway ceases to be a highway, the owner becomes entitled to full and unabridged rights of ownership in the property. *Sundaram Ayyar v. Municipal Council of Madura*, I. L. R. 25 Mad. 635, and *Madathapu Ramaya v. Secretary of State for India*, I. L. R. 27 Mad. 386, followed. *Chairman of the Naihati Municipality v. Kishori Lal Goswami*, I. L. R. 13 Cal. 171, *Madhu Sudan Kundu v. Promoda Nath Roy*, I. L. R. 20 Calc. 732, *Chairman of the Howrah Municipality v. Khetra Krishna Mitte*, I. L. R. 33 Calc. 1290, *Nihal Chand v. Azmat Ali*, I. L. R. 7 All. 362, *Nagar Valab Narsi v.*

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The Municipality of Dhandhuka, I. L. R. 12 Bom. 490, *The Municipal Commissioners of Madras v. Sarangapani Mudaliar*, I. L. R. 19 Mad. 154, *Sundaram Ayyar v. The Municipal Council of Madura*, I. L. R. 25 Mad. 635, *Madathapu Ramaya v. Secretary of State for India*, I. L. R. 27 Mad. 386, *The Mayor of Tunbridge Wells v. Baird*, [1896] A. C. 434, *Municipal Council of Sydney v. Young*, [1898] A. C. 457, *Finchley Electric Light Co. v. Finchley Urban Council*, [1903] 1 Ch. 437, *Foley's Charity Trustees v. Dudley Corporation*, [1910] 1 K. B. 317, *London and N. W. Ry. Co. v. Westminster Corporation*, [1905] A. C. 426, *Lodge Holes Colliery Co. v. Wednesbury Corporation* [1905] A. C. 323, *Battersea Vestry v. County of London*, [1899] 1 Ch. 474, referred to. GUNENDRA MOHAN GHOSH v. CORPORATION OF CALCUTTA (1916) I. L. R. 44 Calc. ... 689

Public Pathway—Obstruction—Proceedings against several without statement of particular acts of obstruction done by each—Initial and final orders, vague—No reasonable opportunity given to show cause and adduce evidence—Legality of order based on local inquiry or information at time of conditional order—Criminal Procedure Code (Act V of 1898), ss. 133, 136, 137. In a proceeding under s. 133 of the Criminal Procedure Code against several persons, alleging various acts of unlawful obstruction to a public way, the initial and final orders must state accurately the specific obstruction caused by each, and which he is required to remove, unless it is alleged that all of them are jointly responsible for all the obstructions complained of. An order under the section should not be vague, indefinite or ambiguous, but such as to afford information by its terms to the person to whom it is directed what he is to do in

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order to comply with it. <i>Kali Mohan Kar v. Nakari Chandra Das</i> , 11 C. L. J. 114, followed. It is desirable that reasonable opportunity should be given the parties proceeded against under s. 133 to show cause under s. 135 (b) or adduce evidence under s. 137(1). The report or other information on which the Magistrate has passed the conditional order under s. 133, is not evidence against the person to whom it is directed. <i>Srinath Roy, v. Ainadli Halder</i> , I. L. R. 24 Calc. 395, approved. An order under s. 133 cannot, even by consent of parties, be based on information gathered at a local inquiry. <i>Upe dra Nath Mandal v. Rampal</i> , 10 C. L. J. 482, approved.	
<i>RAIMOHAN KARMAKAR v. EMPEROR</i> (1916) I. L. R. 44 Calc. ...	61
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Railway administration: See LOSS OF GOODS ...	16
Railway Passenger—Fraud—Travelling without a ticket but not with intent to defraud—Course open to Railway Administration in such case—Power to forcibly eject passenger—Assault—“Railway”—“Rolling stock”—Railways Act (IX of 1890), ss. 3 (4), (10), 68, 69, 113, 120, 122—Railways Act (IV of 1879), ss. 31 and 32—Enhancement of sentence on hearing of Reference. The main and primary purpose of ss. 68 and 69 of the Railways Act (IX of 1890) is to prevent persons from travelling in fraud of the Company without payment of the fare, and the obligation to show their tickets, when required, is subsidiary only to such purpose. Travelling with-	

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out a ticket, in the absence of intent to defraud, is not an offence. In such a case the only course open to the Railway Administration is that provided in s. 113. There is no provision in the Act for ejecting passengers except in certain circumstances such as are specified in s. 120. S. 122 does not apply to passengers travelling in a railway carriage, as the term “railway” in s. 3 (4) excludes a carriage. Where a person travelled without a ticket, not with intent to defraud but because he arrived as the train was about to start and was, therefore, unable to purchase one, and when asked for it by the travelling ticket-checkers offered to pay the fare and excess charge on grant of a receipt, but refused to leave the compartment at the next station and purchase a ticket as he was directed to do by the ticket-checkers:— <i>Held</i> , that the ticket-checkers had no lawful authority to remove him thereupon forcibly from the carriage and to beat him with their fists, and that they were guilty of an offence under s. 323 of the Penal Code: <i>Pratab Daji v. B. B. & C. I. Railway Co.</i> , I. L. R. 1 Bom. 52, distinguished. <i>Buller v. Manchester, Sheffield and Lincolnshire Railway Company</i> , 21 Q. B. D. 207, referred to. The Court cannot entertain an application for enhancement on the hearing of a reference under s. 438 of the Code. Such applications ought to be made in the usual way, and are not ordinarily entertained on behalf of private parties. <i>MOHAMMED HOSAIN v. FARLEY</i> , (1916) I. L. R. 44 Calc. ...	279
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Rateable Distribution: Civil Procedure Code (Act V of 1908) s. 73; O. XXI, r. 65—Policy underlying the section—Receipt of purchase-money by agent, effect of. The policy, which underlies s. 73 of the Code of Civil Procedure, obviously is to fix the point of time when the entire body of persons entitled to claim rateable distribution should be finally ascertained; that point of time is the moment when the entire purchase-money has been paid by the purchasers. It is immaterial from this point of view whether the purchase-money has been actually paid into the Treasury or into the hands of a person employed by the Court to hold the sale. When a sale has been held by a Court in execution, under Order XXI, r. 65, receipt of purchase-money by the agent is, for the purposes of s. 73, equivalent to receipt of assets by the Court. <i>Golam Hossein v. Fatima Begum</i> 16 C. W. N. 394, <i>Maharaja of Burdwan v. Apurba Krishna Roy</i> , 14 C. L. J. 50, distinguished. <i>Huddersfield Banking Company, Ltd., v. Henry Lister & Son, Ltd.</i> , [1895] 2 Ch. 273, <i>Wentworth v. Bullen</i> , 9 B. & C. 840, <i>Crosskey v. Mills</i> , 1 C. M. & R. 298, <i>Gray v. Haig</i> , 20 Beav. 219, referred to. <i>GALSTAUN v. WOOMES CHANDRA BONNERJEE</i> , (1916) I. L. R. 44 Calc. ... 789	
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Remand: Appellate Court, power of—Inherent jurisdiction—Correction of omissions or defects in the trial—De novo trial—Civil Procedure Code (Act V of 1908), ss. 107, 151; O. XXI, r. 23.—The power of remand under s. 107 of the Civil Procedure Code is limited to the case described in O. XXI, rule 23, but nothing in that section restricts in any manner the application of the principle of inherent power recognised by s. 151 of the Code. The powers of the Appellate Court as regards remand are thus not restricted to the case specified in O. XXI, r. 23, but the Court, by reason of its inherent jurisdiction, recognised and preserved in the Code, may order a remand in cases other than the case specified in O. XXI, r. 23, if it be necessary for the ends of justice. *Nabin Chandra Tripati v. Prankrishna De*, I. L. R. 41 Calc. 108, dissented from. Inherent jurisdiction must be exercised with care, subject to general legal principles and to the condition that the matter is not one with which the Legislature has so specifically dealt as to preclude the exercise of inherent power. *Per WOODROFFE J.* Whether justice does require a Court to invoke its inherent jurisdiction, must be determined by that Court, with reference to the particular facts of the case, and the rule of law that a Court cannot invoke an inherent jurisdiction where there is a provision in the Code, whether by way of remand or otherwise, which, if applied, will meet the justice of the case. *Per MOOKERJEE J.* That the Code itself recognises the power of a Court to direct a remand in circumstances other than those specified in O. XXI, r. 23, is clear from the terms of s. 99. The Court of Appeal is invested with plenary powers to correct errors of procedure committed by the trial Court. Where the Court of Appeal is satisfied that the correction of the

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omission or defects in the trial is not reasonably practicable by recourse to one or other of the provisions mentioned, that is. where it is clearly apparent that the Appellate Court cannot itself satisfactorily dispose of the suit on the merits by the adoption of the specific procedure mentioned in O. XLI, rules 24 to 29, a remand for retrial is not only permissible but obviously incumbent on the Court. <i>GHUZHABI v. THE ALLAHABAD BANK, LTD.</i> , (1917) I. L. R. 44 Calc. ... 929	
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—Finding in claim case, if resjudicata re other properties— <i>Civil Procedure Code (Act V of 1908), O. XXI, r. 63, effect of—Wakf, validity of.</i> Properties A and B are included in an alleged wakf. The finding in a claim case regarding A that the wakf is a fraudulent transaction is not conclusive in a suit for declaration and possession regarding a share in B. An order in a claim case is conclusive only as regards the particular property in dispute. <i>Held</i> , further, that a wakf having been given effect to during the life time of the wakifs, is valid and irrevocable. <i>Surnamoyi Dasi v. Ashutosh Goswami</i> , I. L. R. 27 Calc. 714, <i>Koyyana Chittemma v. Doosy Gavaramma</i> , I. L. R. 29 Mad. 225, <i>Ramu Aiyar v. A. L. Palaniappa Chetty</i> , I. L. R. 35, Mad. 35, distinguished. <i>Radha Prasad Singh v. Lal Sahab Rai</i> , I. L. R. 13 All. 53, <i>Dinkar Ballal Chakradev v. Hari Shridhar Apte</i> , I. L. R. 14 Bom. 206, referred to. <i>ASHNA</i>	

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—: Application for review subsequent to filing of second appeal— <i>Civil Procedure Code (Act V of 1908), s. 114; O XLVII, r. 1.</i> Where an application for review of judgment is filed and later, during the pendency of the same, an appeal is preferred.— <i>Held</i> , that the Court has power and in fact is bound to proceed with the application for review of judgment notwithstanding the fact that an appeal has been subsequently filed. But the power exists so long as the appeal is not heard. <i>Bharat Chandra Mazumdar v. Ramgunga Sen</i> , (1866) B. L. R. (F. B.) 362, <i>Chenna Reddi v. Peddaobi Reddi</i> , I. L. R. 32 Mad. 416, followed. <i>Thacoor Prosad v. Baluck Ram</i> , 12 C. L. R. 64, <i>Sarat Chandra Dhal v. Damodar Manna</i> , 12 C. W. N. 885, <i>Narayan Purushottam Gargote v. Laxmibai</i> , I. L. R. 38 Bom. 416, referred to. On the other hand, if the application is successful, the appeal cannot proceed. <i>Kanhaiya Lal v. Baldeo Prasad</i> , I. L. R. 28 All. 240, referred to. <i>PYABI MOHAN KUNDU v. KALU KHAN</i> (1917), I. L. R. 44 Calc. ... 1011	
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— for Arrears of Rent—Purchase of putni—Opposition to purchaser's possession—Application for proclamation—The District Judge or the Collector, the proper authority to issue proclamation—Rent Recovery (Under-Tenures) Act (Beng. VIII of 1865), s. 3—Repealing Act (XVI of 1874)—Regulations VIII of 1819, ss. 8, 9, 15 (2) : I of 1820 and VII 1882, s. 16. Clause (2) of section 15 of Regulation VIII of 1819 has not been affected by s. 3 of Beng. Act VIII of 1865. Proceedings taken to annul the sale of certain putni lands sold for arrears of rent having terminated in favour of the purchaser and the sale having become final and conclusive, the purchaser in attempting to realise the rents from the cultivators of the lands comprised in the tenure purchased by him was opposed in his attempt by some of the intermediate holders who claimed interest between the late putnidar and the cultivators. Thereupon, he applied to the District Judge to issue a proclamation under s. 15 of the Putni Regulation VIII of 1819. The District Judge returned the application and directed that it should be made to the Collector who was the proper authority to issue the proclamation. <i>Held</i>, that the view taken by the District Judge was erroneous and that he had failed to exercise the jurisdiction still vested in him by law under clause (2) of section 15 of the Putni Regulation VIII of 1819. MANMATHA NATH MITTER v. DISTRICT JUDGE, 24-PARGANAS (1916), I. L. R. 44 Calc.	715

Sale for Arrears of Revenue—Act XI of 1859—Co-owners of a share of estate subject to usufructuary mortgage—Mortgagee in possession, undertaking by, to pay revenue—

Sale for Arrears Revenue—contd.

*Default deliberately made by agents of minor mortgagee—Purchase at sale for arrears by mortgagee's agents—Benami purchase—Fiduciary relation between mortgagee and mortgagors—Suit by other co-owners to set aside sale—Terms on recovery of property—Contribution towards expenses properly incurred by mortgagee—Duty of counsel in ex parte case—Privy Council. practice of. Of a 12 annas share of a revenue-paying estate, a 3 annas share belonged to the plaintiffs (respondents) subject to a usufructuary mortgage of that share for the benefit of the defendant (appellant) a minor who, as mortgagee in possession, undertook (as was stipulated in the mortgage deed) to pay the revenue to Government for the mortgaged share. The remaining nine annas belonged to others of the plaintiffs. In June 1905, a sum of Rs. 3, annas 6 in excess of the quota payable was paid on the mortgagee's behalf by his agents. In September 1906, only Rs. 9 instead of Rs. 12 was so paid, and that left a balance owing which in due course amounted to an arrear within the meaning of Act XI of 1859 and to recover this arrear the 12 annas estate was sold by the Collector on 25th March 1907 and purchased by the agents benami on behalf of the mortgagee defendant. The High Court, reversing the judgment of the Subordinate Judge who had dismissed the suit, found that the purchase was fraudulent, while their Lordships of the Judicial Committee acquitted the minor of any personal misconduct in relation to the default or sale, and were of opinion that regarding the position as a whole it led to the conclusion that the revenue was intentionally allowed by the agents to fall into arrear with a view to the property being put up for sale and bought on behalf of the minor. *Held*, that*

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Sale for Arrears of Révénué—contd.

the arrear which occasioned the sale was due to the insufficient payment made in respect of the three annas share, and this was none the less the result of the default of those interested in that share because an excess payment had been made in June 1903; that had been long absorbed and had ceased to be an excess credit in the tauzi ledger. However free from personal blame the minor may have been, he could not profit by his agents' deliberate default committed in breach of the terms of his mortgage. As against his mortgagors, therefore, the mortgagee could not be allowed to hold for himself any advantage gained by the default for which his agents were responsible, nor could he be permitted to hold such advantage to the prejudice of the co-owners. *Doorga Singh v. Sheo Pershad Singh*, I. L. R. 16 Calc. 194, dissented from. *Faizur Rahman v. Maimuna Khatun*, 17 C. W. N. 1233, approved. The mortgagee here through his representatives had a duty to perform which was inconsistent with his becoming a purchaser in the way he did; his title, therefore, could not operate to the exclusion of his co-owners. It was no answer to say that Act XI of 1859 contemplates a purchase by a co-sharer. The sale would stand, but under the circumstances the transaction was in effect nothing more than payment of an arrear for the benefit of all. But that gave a right to contribution so that it must be a term of granting the plaintiffs' equitable relief that they should contribute to the expenses properly incurred by or for the mortgagee in the purchase of the property. Where an appeal is heard *ex parte* it is the duty of counsel to bring to the notice of Board adverse as well as favourable authorities. *DEO NANDAN PRASHAD v. JANKI SINGH* (1916), I. L. R. 44 Calc. ... 573

Sale for Arrears of Revenue—concl'd.

Defaulter

Assam Land Revenue Regulation (I of 1886), ss. 63, 67, 85—*Limitation—Limitation Act* (IX of 1908), Sch. I, Arts. 121, 142. Where persons are in actual possession of a part of the estate sold for arrears of revenue under the Assam Land and Revenue Regulation they are defaulters by reason of section 67. *Afiar Ali v. Brojendra Kishore Roy Chowdhury*, 24 C. L. J. 60, referred to. A suit for recovery of possession brought within 12 years from the date on which the Collector gave symbolical possession to the purchasers, is within time. *Mozuffer Wahid v. Abdus Samad*, 6 C. L. R. 539, followed. Section 63 cannot be construed as restricted to persons who profess to hold the land as included in the estate sold for arrears of revenue. *MAHIM CHANDRA CHOWDHURY v. PIYARI LAL DAS*, (1916) I L. R. 44 Calc. 412

Sale in Execution of Decree—Decree

against father of joint mitakshara family—Suit by sons the other members of the family to have it declared that their shares were not affected by the sale under mortgage decree—“Right, title and interest” of judgment-debtor—Substance and not technicalities of transaction to be regarded in cases of this kind. In execution of a mortgage decree against the father of a joint mitakshara family who alone was a party to the mortgage, the decree and the execution proceedings, his two sons, the other members of the family, objected that only one-third of a *patni* taluk forming the joint family property could be sold, on the allegation that the debts in respect of which the decree had been made were contracted for illegal and immoral purposes, and the order for sale was amended by adding the words “right, title and interest” of the judgment-debtor as indicating what was to be sold, which expression the Court said

Sale in Execution of Decree—*concl'd.*

was not calculated to affect the case of either party. The property was sold and purchased by the decree-holder. In a suit by the sons to have it declared that only one-third of the property passed by the sale, both Courts in India found that the debts were for legal and necessary purposes. The Subordinate Judge made a decree in the plaintiffs' favour which was reversed by the High Court on appeal. *Held* (affirming the decision of the High Court), that the proper construction of the order for sale, as amended, was that, if the plaintiffs succeeded in establishing that the debts had been incurred for immoral purposes, only one-third of the property would be affected by the sale, while if they failed in that contention the whole of the property would be held to have passed by the sale. The expression "right, title and interest" did not limit what was to be sold to a one-third share. In cases of this kind the substance, and not the mere technicalities of the transaction, should be regarded. *Mahabir Pershad v. Moheshwar Nath Sahai*, I. L. R. 17 Cal. 584; L. R. 17 I. A. 11, followed. *SRIPAT SINGH DUGAR v. PRODYOT KUMAR TAGORE*, (1916) I. L. R. 44 Cal. ... 524

Sanction for Prosecution: See APPEAL, RIGHT OF ... 804

False information to the police followed by a complaint to the Magistrate on the same facts and the same charge—Complaint investigated by the Magistrate—Necessity of sanction to prosecute informant only in respect of the false charge to the police—Criminal Procedure Code (Act V of 1898), s. 195 (1) (b). Where an information to the police is followed by a complaint to the Court, based on the same allegations and the same charge, and such complaint has been investigated by the Court, the sanction or complaint of the Court itself is necessary even

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Sanction for Prosecution—*concl'd.*

for a prosecution of the informant under s. 211 of the Penal Code, in respect of the false charge made to the police. *Tagebullah v. King Emperor*, 24 C. L. J. 134; I. L. R. 43 Cal. 1152, approved. *Putitram Ruidas v. Mahomed Kasem*, 3 C. W. N. 33, discussed. *Jadu Nandan Singh v. Emperor*, I. L. R. 37 Cal. 250, distinguished. *Emperor v. Hardwar Pal*, I. L. R. 34 All. 522, referred to. *BROWN v. ANANDA LAL MULLICK*, (1916) I. L. R. 44 Cal. ... 650

High Court, Jurisdiction of Practice—Procedure—Suit in the Presidency Small Cause Court—Statement made in the course of a judicial proceeding—Sanction refused by Presidency Small Cause Court—Revision by single Judge sitting on the Original Side of High Court—Remand—Powers of the Chief Justice to remit case for retrial by Division Bench of High Court—Civil Procedure Code (Act V of 1908), s. 115—Criminal Procedure Code (Act V of 1898), ss 195 (6) and (7) (c), 435 and 439—High Court Rules, Appellate Side, Chapter II, rule V. The assistance of a Judge of a High Court can, in a matter of sanction to prosecute from the Presidency Small Cause Court, be invoked only under s. 195(6) of the Criminal Procedure Code. Under that provision the only order which such a Judge is competent to pass is to revoke a sanction given or grant a sanction refused by the Subordinate Court. He has no jurisdiction to remand the case to the Small Cause Court for further enquiry. Under the Rules of Court (Chap. II, Rule V) he would have such jurisdiction if this were a matter under s. 115 of the Civil Procedure Code, but as it falls within s. 195(6) of the Criminal Procedure Code, it can be decided only by a Judge or Judges to whom it may have been allocated by the Chief Justice. The Judge

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Sanction for Prosecution—contd.

exercising jurisdiction under s. 195(6) of the Criminal Procedure Code is competent to take additional evidence to enable him to decide whether he should confirm or reverse the order of the Subordinate Court. *BUDHU LAL v. CHATTU GOPE*, (1916) I. L. R. 44 Calc. 816

“Produced,” meaning of—Document called for by a party and brought into Court, and referred to by his pleader and the Court—Antecedent forgery and user before the Sub-Registrar—Subsequent production of document in Court—Necessity of sanction—Criminal Procedure Code (Act V of 1898), s. 195 (1) (c). Where a document was called for by a party to a proceeding under s. 145 of the Criminal Procedure Code, brought into Court and referred to by his pleader in argument and by the Magistrate in his judgment, though he expressly refrained from any opinion, as to its authenticity:—*Held*, that the document was “produced” in the proceeding within the meaning of s. 195 (1) (c) of the Code. *Guru Charan Shaha v. Girija Sundari Dassi*, I. L. R. 29 Calc. 887, *Akhil Chandra De v. Queen Empress*, I. L. R. 22 Calc. 1004, *Sew Bollok Singh v. Ramdhan Bania*, 14 C. W. N. 806, and *In re Gopal Siddheswar*, 9 Bom. L. R. 735, referred to. Where, before complaint made, a document has been produced in a Court by a party to a proceeding before it, the sanction of such Court is necessary for his prosecution in respect of an antecedent forgery and antecedent user before a Sub-Registrar. *Teni Shah v. Bolahi Shah*, 14 C. W. N. 479, *Emperor v. Bhawani Das*, I. L. R. 38 All. 169, and *Re Parameswaran Nambudri*, I. L. R. 39 Mad. 677, followed. *Noor Mahomed Cassum v. Kaikhosru Maneckjee*, 4 Bom. L. R. 268, dissented from. *NALINI KANTA LAHA v. ANUKUL CHANDBA LAHA* (1917) I. L. R. 44 Calc. ... 1002

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Sanction for Prosecution—concl.

Propriety of process under s. 500, Penal Code—Discharge—Acquittal—Penal Code (Act XLV of 1860), ss. 211, 500—Criminal Procedure Code (Act V of 1898), s. 195. Where an offence though described as an offence under s. 500 of the Penal Code, still remains an offence “punishable” under s. 211. Process should not issue under the former section on the application of a person discharged or acquitted, when the Court has refused sanction under the latter section. *PRAFULLA KUMAR GHOSE v. HARENDRA NATH CHATTERJEE* (1916) I. L. R. 44 Calc. 970

School-master—Contract of service—

Termination by notice—Reasonable notice, what is, in case of school-master—Custom how proved. One G. H. W. was appointed a teacher at the Armenian College, Calcutta, for a period of three years from the 1st March 1912. After the expiry of the period he continued in the employ of the College until July 1916, when he received notice terminating his service as from the 1st August, and in lieu of a month's notice, was paid a month's salary and a certain sum of money for a month's board and lodging:—*Held*, that he was entitled to a reasonable notice and that in such a case, in the absence of misconduct, either three months' notice, or a term's notice would be reasonable notice. *Todd v. Kerrich*, 8 Exch. 151, referred to. *Held*, further, that, on the evidence adduced, no custom had been established by virtue of which the plaintiff's employment could be terminated by a month's notice. Usage is proved by the oral evidence of persons who become cognisant of its existence by reason of their occupation in the particular trade or business, and the evidence establishing custom or usage must be clear, convincing and consistent, and to prove an usage in a particular

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School-master—<i>conold.</i>		Small Cause Court Suit—<i>conold.</i>	
cular trade it must be shown that the usage is consistent and reasonable and was universally acquiesced in, and that everybody acknowledged it in the trade and knew of it or might know of it, if he took the pains to enquire. <i>WITTENBAKER v. J. C. GALSTAUN AND OTHERS</i> , (1917) I. L. R. 44 Calc. ...	917	<i>Hemant Kumar Ray</i> , 19 C. W. N. 758, followed. <i>BIPIN BEHARI SHAHA v. ABDUL BARIK</i> (1916), I. L. R. 44 Calc. ...	950
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Simple Mortgage : See ADVERSE POSSESSION ...	425	Stamp-duty—<i>Mere fact of putting a stamp not of proper value, whether an offence—Stamp Act (II of 1899), ss. 64, cl. (c), 68—Intention to defraud.</i> In construing clause (c) of s. 64 of the Indian Stamp Act, the words "any other act" must be taken to mean an act of a like nature to those which are specified in clauses (a) and (b); and the mere fact that a person puts a stamp on a document which he knows to be not of proper value, would not come within clause (c) of section 64, unless there is an intention to defraud the Government. <i>Queen Empress v. Somasundaram Chetti</i> , I. L. R. 23 Mad. 155, referred to. <i>CHHAKMAL CHOPRA v. EMPEROR</i> , (1916) I. L. R. 44 Calc. ...	321
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— Suit—Dismissal for default—Application for restoration of suit—Review—Civil Procedure Code (Act V of 1908) ; O. IX, rr. 4, 9 ; O. XLVII, r. 1—Provincial Small Cause Courts Act (IX of 1887), s. 17. When a Small Cause Court suit is dismissed for the plaintiff's default in the presence of the defendant, and an application made under O. IX, rr. 4 and 9 for the restoration of that suit is also dismissed for the plaintiff's default in the presence of the defendant's pleader, and where again an application is made under O. IX, r. 9, for the rehearing of the case and another application for treating it as an application for review :— <i>Held</i> , that an application under O. IX, r. 9 lay. O. XLVII, r. 1, applied to all orders of the Court which may be reviewed under certain circumstances. <i>Held</i> , further, that the provisions of s. 17 of the Provincial Small Cause Courts Act did not apply to miscellaneous applications. <i>Deljan Nickha Bibi v.</i>		Surety—Grounds of fitness—Pecuniary sufficiency—Inability of control—Discretionary power of the Court on the facts of each case—Propriety of the order—Criminal Procedure Code (Act V of 1898), s. 122. The question as to the fitness of a surety is one of discretion in each case, and the High Court has only to consider whether the order of the Magistrate is reasonable and proper in the circumstances of the particular case. <i>Jalil v. Emperor</i> ,	

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Surety—concl'd.	Theatrical Performance—concl'd.
13 C. W. N. 80, <i>Jafar Ali Panjalia v. Emperor</i> , I. L. R. 37 Cal. 446, and <i>Emperor v. Asiraddi Mandal</i> , I. L. R. 41 Calc. 764, approved. <i>Ram Pershad v. King-Emperor</i> , 6 C. W. N. 593, <i>Adam Sheikh v. Emperor</i> , I. L. R. 35 Calc. 400, and <i>Rayan Khan v. Emperor</i> , I. L. R. 43 Calc. 1024, not followed. <i>ABDUL KARIM v. EMPEROR</i> (1916), I. L. R. 44 Calc. ... 737	<i>Calcutta Municipal Act (Beng. III of 1899)</i> , ss. 559(52), 561— <i>Bye-laws 83 and 85—Validity of bye-law 85</i> . Bye-law 85 framed under s. 559(52) of the Calcutta Municipal Act (Beng. III of 1899) is not <i>ultra vires</i> by reason of s. 561 thereof, and each of the joint proprietors of a theatre is liable to a fine to the extent of Rs. 20 for keeping it open after 1 A.M., in contravention of bye-law 83. <i>Amrita Lal Bose v. Corporation of Calcutta</i> , 21 C. W. N. 1009, overruled. <i>Reg. v. Shourdar Ghenar</i> , 7 Bom. H. C. R. 39, distinguished. <i>Rex v. Clark</i> , 2 Cowp. 610. <i>Queen v. Littlechild</i> , L. R. 6 Q. B. 293, referred to. <i>Per MOOKERJEE J.</i> As a general principle of criminal law, all who participate in the commission of an offence are severally responsible, as though the offence had been committed by each of them acting alone; consequently each must be separately punished. <i>AMRITA LAL BOSE v. CORPORATION OF CALCUTTA</i> (1917), I. L. R. 44 Calc. ... 1025
Surety, liability of: See PRINCIPAL AND SURETY ... 978	Theft: See LURKING HOUSE-TRESPASS ... 358
Talabi Brahmottar: See GRANT ... 585	— <i>Dishonest intent—Bonâ fide claim of right to property, or mere pretence—Proper question for consideration by the Criminal Courts—Criminal trespass—Evidence of complainant's possession, illusory—Penal Code (Act XLV of 1860) ss. 379, 447.</i> The removal of property in the assertion of a <i>bonâ fide</i> claim of right, though unfounded in law and fact, does not constitute theft. But a mere colourable pretence to obtain or keep possession of property does not avail as a defence. Whether the claim is <i>bonâ fide</i> or not must be determined upon all the circumstances of the case, and a Court ought not to convict unless it holds that the claim is a mere pretence. <i>Rex v. Hall</i> , 3 C. & P. 409, <i>Reg. v. Wade</i> , 11 Cox. 549, <i>Rex v. Jenner</i> , 7 L. J. M. C. (O. S.)
Tenancy-at-will—Yearly rent reserved—Lease, whether by registered instrument only—Transfer of Property Act (IV of 1882), s. 107. Section 107 of the Transfer of Property Act does not lay down that a lease of immoveable property can be made only by a registered instrument; but it can be made only by a registered instrument in three cases, viz., (i) a lease from year to year, (ii) a lease for any term exceeding one year; and (iii) a lease reserving a yearly rent. The fact that the rent is reserved at so much a year does not conclusively show that the tenancy is from year to year. The terms of a tenancy which does not come within section 107 of the Transfer of Property Act can be proved by oral evidence. <i>Lala Surabh Narain Lal v. Catherine Sophia</i> , 1 C. W. N. 248, <i>Fazel Sheikh v. Keramuddi Sheikh</i> , 6 C. W. N. 916, <i>Sita Nath Pal v. Kartick Gharmi</i> , 8 C. W. N. 434, and <i>Venkatagiri Zamindar v. Raghava</i> , I. L. R. 9 Mad. 142, referred to. <i>SARAT CHANDRA DUTT v. JADAB CHANDRA GOSWAMI</i> (1916), I. L. R. 44 Calc. ... 214	
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79, *Reg. v. Leppard*, 4 F. & F. 51,
Nassib Chowdhry v. Nanoo Chowdhry, 15 W. R. Cr. 47, *Runnoo Singh v. Kali Churn Misser*, 16 W. R. Cr. 18, *Mahomed Jan v. Khadi Sheik*, 16 W. R. Cr. 75, *Khetter Nath Dutt v. Indro Jalia*, 16 W. R. Cr. 78, *Empress v. Budh Singh*, I. L. R. 2 All. 101, *In re Madhab Hari*, I. L. R. 15 Calc. 390n, *Pandita v. Rahimulla Akundo*, I. L. R. 27 Calc. 501, *Emperor v. Sabalsang*, 4 Bom. L. R. 936, *Algaraswami Tevan v. Emperor*, I. L. R. 28 Mad. 304, *Hari Bhui-mali v. Emperor*, 9 C. W. N. 974, followed. *Held*, upon the facts, that even if the accused had failed to establish his title and possession to the land, it was a case of a *bonâ fide* dispute, and that the conviction of theft was bad. *ARFAN ALI v. EMPEROR*, (1916) I. L. R. 44 Calc. ... 66

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— — — *Grantor and grantee—Bengal Tenancy Act (VIII of 1885), s. 85, sub-s. (1), construction of—Contravention of the section, effect of—Estoppel, its application.* The title of a grantee who can fall back upon prior possession as tenant or otherwise, cannot be defeated by mere proof of contravention of s. 85 of the Bengal Tenancy Act; and as between grantor and grantee, the rule of estoppel applies when the elements essential to attract its operation are proved to exist. The creation of complete relation of landlord and tenant in law estops the tenant from denying the validity of the title which he has admitted to exist in the landlord. The estoppel arises not by reason of some fact agreed or assumed to be true, but as the legal effect of carrying the contract into execution, of the tenant taking possession of the property from the hand of the lessor. *Bhaiganta Bewa v.*

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Himmat Bidyakar, 24 C. L. J. 103 followed. It is no more open to the defendant than to the plaintiff to prove facts contrary to the allegations which formed the basis of the contract, after the contract has been carried into execution and the contracting parties have enjoyed benefits thereunder. *Madan v. Jaki*, 6 C. W. N. 377, *Gopal Mondal v. Eshan Chunder Banerjee*, I. L. R. 29 Calc. 148, *Tamijuddi v. Asgar Howladar*, I. L. R. 36 Calc. 256, *Janakinath v. Prabhasini*, 22 C. L. J. 99, *Lani v. Muhammad*, 20 C. W. N. 948, *Gonesh v. Thanda*, 24 C. L. J. 539, referred to. *BAMANDAS BHATTACHARJEE v. NILMAHADAB SAHA*, (1916) I. L. R. 44 Calc. ... 771

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Waiver—Jurisdiction—Leave to sue— <i>Letters Patent 1865, cl. 12—</i> <i>Estoppel.</i> Where the plaintiff in his plaint alleges that portion of the cause of action arises outside the local limits of the Ordinary Original Civil Jurisdiction of this Court and fails to take leave under cl. 12 of the Letters Patent, the defendant may by appearing and pleading waive the objection to the jurisdiction. Where, however, the plaintiff alleges that the whole cause of action arises within the local limits of the Ordinary Original Civil Jurisdiction, thus setting up a complete jurisdiction in the Court, and the defendant is called upon to plead to this and does plead, but it turns out at the trial that the Court had not complete jurisdiction as portion of the cause of action arose within and portion outside the local limits of the Ordinary Original Civil Jurisdiction, the defendant cannot be held bound on the doctrine of estoppel on the ground that he waived the objection of want of jurisdiction. <i>King v. Secretary of State for India</i> , I. L. R. 35 Calc. 394. and <i>Suckan v. Weiner</i> , 17 T. L. R. 494, referred to. SHAMA KANTA CHATTERJI AND COMPANY v. KUSUM KUMARI (1916) I. L. R. 44 Calc.	10
Wakt, validity of: See RES JUDICATA	698
Waste Lands Act (XXIII of 1863), s. 18— <i>Procedure under that Act—Sale by Government of lands under the Act—Error in advertisement of Sale—Absence of proof of proclamation ousting jurisdiction of ordinary</i>	

Waste Lands Act (XXIII of 1863), s. 18—
contd.

Courts and constituting a Special Court—Three years' limit for claims only applicable to proceedings before Special Court—Act applied to other lands than those only held by Government. Great weight had always been given by the Judicial Committee to the accuracy of survey maps: they were not conclusive, but in the absence of evidence to the contrary they will be presumed to be accurate. This appeal arose out of a suit by the Maharajah of Tipperah to recover possession of certain plots of land in Sylhet from the Government and from certain Tea Companies who in virtue of leases granted by the Government were in possession of the lands in suit. There were concurrent findings of fact by the Courts in India that the lands in question were *de facto* in the possession of the plaintiff and his predecessors since the beginning of the 19th century; and that the dispossession had taken place within 12 years before suit so as to exclude the plea of limitation: and the Judicial Committee substantially upheld the decision of the High Court in favour of the plaintiff. One plot, however, had been sold by the Government as waste land and the sale was not in any way stopped or interfered with by the Rajah, and more than three years had elapsed from the date of delivery to the purchaser, which was the period provided by section 18 of the Waste Lands Act (XXIII of 1863) after which no "claim to any land, or to compensation or damages in respect of any land sold as waste land could be received"; and it was contended that the suit was barred by section 18 as to that plot. *Held*, that the Act was one which was drastic in its character and made great invasion on private rights. The defendant who pleaded it must therefore bring the

Waste Lands Act (XXIII of 1863) s. 18—
concl'd.

matter strictly within its provisions which clearly pointed to the necessity of proper intimation being given by Government as to the proposed sale, and where they had given a misleading notice and had advertised a sale of lands in one district when they were situated in another district, the whole of the sale proceedings failed for want of a proper basis. When a claim was allowed under the Act, procedure was provided for the issue of a proclamation which ousted the jurisdiction of the ordinary Courts and constituted a Special Court, and no proof had in this case been given that any proclamation was issued. The provision as to three years in section 18 was clearly applicable to the proceedings before the Special Court and that Court alone. The procedure under the Waste Lands Act is not applicable only to lands belonging to the Government. **SECRETARY OF STATE FOR INDIA v. BIRENDRA KISHORE MANIKYA** (1916) I. L. R. 44 Cal. 328

Wife's Costs: See DIVORCE ... 35

Will: See ESTOPPEL ... 145

Will—Construction—Bequest by Hindu testator to widow, daughter, and daughter's daughter—Succession Act (X of 1865), s. 111. Where a testator intended that his wife, daughter and daughter's daughter should each have an absolute interest in the property, and so long as anybody descended from himself was in existence, his brother's son or the latter's descendants should have no interest in the property and where the provisions of his will ran thus—"If my wife die before, my daughter Ganga-

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Will—concl'd.

mani Dehya shall get the property, etc.": *Held*, that under the provisions of s. 111 of the Succession Act the daughter takes only a life interest. **Lallu v. Jagmohan**, I. L. R. 22 Bom. 409, **Mahendra Lal v. Rakhal Das**, 17 C. L. J. 630, **Tripurari Pal v. Jagat Tarini Dasi**, I. L. R. 40 Cal. 274, **Sures Chandra Palit v. Lalit Mohan Dutta Chowdhuri**, 20 C. W. N. 463, referred to. **JAGAT BIJOY BHATTACHARJEE v. TOMWOOD HOWLADAR**, 1916) I. L. R. 44 Cal. ... 181

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